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# FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

# FEDERAL COMMUNICATIONS COMMISSION

Reed E. Hundt, Chairman
James H. Quello
Andrew C. Barrett
*Susan Ness
**Rachelle B. Chong

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*Commissioner Ness sworn in on June 3, 1994.
**Commissioner Chong sworn in on June 6, 1994.

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# Federal Communications Commission Record

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-126**

In the Matter of

Amendment of Section 73.202(b), RM-8531
Table of Allotments,
FM Broadcast Stations.
(Willows, California)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 1, 1994; Released: November 14, 1994**

**Comment Date: January 5, 1995**
**Reply Comment Date: January 20, 1995**

By the Acting Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by KIQS, Inc.[1] ("petitioner") requesting the allotment of FM Channel 292A to Willows, California, as that community's second local FM service.[2] Petitioner stated its intention to apply for Channel 292A if it is allotted to Willows, as requested.

## TECHNICAL STATEMENT

2. A staff review of the proposal reveals that Channel 292A can be allotted to Willows, California, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 14.1 kilometers (8.8 miles) southeast of the community at coordinates 39-25-56 and 122-04-50 to avoid a short spacing to the licensed site of Station KARZ(FM), Channel 291C, Burney, California, at coordinates 40-54-21 and 121-49-38, as well as to the authorized site of Station KDIG(FM), Channel 294B, Orland, California, at coordinates 39-53-17 and 122-37-38.

3. We believe the public interest would be served by proposing the allotment of Channel 292A at Willows, since it could provide the community with an additional local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to Willows, California, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Willows, California | 288A[3] | 288A, 292A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 5, 1995**, and reply comments on or before **January 20, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

KIQS, Inc.
Attn: Anthony F. Rusnak, President
118 W. Sycamore Street
Willows, CA 95988

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

---

[1] KIQS, Inc. is the licensee of Station KIQS(AM), Willows, California.

[2] We note the pendency of a proposal filed in MM Docket No. 94-29, 9 FCC Rcd 1802 (1994), on behalf of Pacific Spanish Network, Inc., licensee of Station KQSC(FM) (formerly Station KIQS-FM), requesting the substitution of Channel 288B1 for Channel 288A at Willows and the reallotment of Channel 288B1 from Willows to Dunnigan, California.

[3] See footnote 2, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 14, 1994**

## PACIFIC BELL FILES REVISIONS TO ITS COST ALLOCATION MANUAL PUBLIC COMMENTS INVITED

On October 28, 1994, Pacific Bell filed proposed revisions to its Cost Allocation Manual (CAM) for the separation of regulated and nonregulated costs. Pacific Bell is revising its CAM to include affiliate transactions between Pacific Bell and Pacific Bell Mobile Services. Parties may file comments on Pacific Bell's CAM no later than **December 7, 1994**. Replies should be filed by **December 22, 1994**. Comments should reference file number **AAD 94-146**. A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554. A copy should also be sent to the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Ed Dashkin at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 14, 1994**

## ALLTEL TELEPHONE SYSTEMS FILES ITS INITIAL COST ALLOCATION MANUAL PUBLIC COMMENTS INVITED

On October 31, 1994, Alltel Telephone Systems (Alltel) filed an initial cost allocation manual (CAM) for the separation of regulated and nonregulated costs on behalf Alltel Georgia Communications Corporation. This CAM was filed pursuant to Section 64.903 of the Commission's Rules. Parties may file comments on Alltel's CAM no later than **December 7, 1994**. Replies should be filed by **December 22, 1994**. Comments should reference file number AAD 94-146. A copy of each pleading should be sent to Kenneth M. Ackerman, FCC, Common Carrier Bureau, 2000 L St., N.W. Room 812, Washington, D.C. 20554. A copy should also be sent to the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037. (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Kenneth M. Ackerman at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-127**

In the Matter of

Amendment of Section 73.202(b), RM-8537
Table of Allotments,
FM Broadcast Stations.
(Wright City, Oklahoma)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: November 3, 1994; Released: November 14, 1994**

**Comment Date: January 5, 1995**
**Reply Comment Date: January 20, 1995**

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Texarkana Broadcasting, Incorporated ("petitioner") requesting the allotment of Channel 277A to Wright City, Oklahoma, as the community's first local aural service. Petitioner states that it will apply for the channel, if allotted.

**TECHNICAL SUMMARY**

2. Channel 277A can be allotted to Wright City in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.7 kilometers (0.5 miles) southeast to avoid a short-spacing to Station KTFX, Channel 277C, Tulsa, Oklahoma.[1] We note that petitioner requested a transmitter site 9.7 kilometers east of the community. However, it is the Commission's policy not to protect a prospective applicant's desired transmitter site but to propose the allotment with the least site restriction necessary where an allotment will be open to application by multiple parties. *See Boone and Stuart, Iowa,* 5 FCC Rcd 4537 (1990), *recon. den.*, 6 FCC Rcd 6036 (1991).

3. We believe the public interest would be served by proposing the allotment of Channel 277A to Wright City, Oklahoma, since it could provide the community with its first local aural broadcast service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Wright City, Oklahoma | -- | 277A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 5, 1995**, and reply comments on or before **January 20, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William J. Pennington, III, Esq.
5519 Rockingham Road-East
Greensboro, NC 27407
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 277A at Wright City are 34-03-23 North Latitude and 94-59-41 West Longitude.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Victory Television Network Station KVTN, Pine Bluff, Arkansas against Community Communications Company — CSR-4133-M

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 1, 1994; Released: November 14, 1994**

By the Chief, Cable Services Bureau:

1. Agape Church, Inc., licensee of Station KVTN (Ind., Channel 25), Pine Bluff, Arkansas, filed a complaint with the Commission alleging that Community Communications Company ("CCC") had refused to carry KVTN's signal after the Station requested mandatory carriage. In response to KVTN's request for carriage, CCC claimed that the Station did not deliver a good quality signal to its principal headend in Monticello, Arkansas, as required by the Commission's rules. According to KVTN, representatives from the Station and CCC jointly conducted tests of KVTN's signal strength at CCC's headend on July 9, 1993, resulting in a measurement of -45 dBm, which meets the Commission's signal strength standards. KVTN claimed that during the course of the tests, CCC's Chief Engineer indicated to the KVTN representatives that the owner of CCC was personally opposed to the mandatory carriage rules and was determined to avoid carriage of the KVTN signal. Based on testing conducted unilaterally by CCC on September 14 and 15, 1993, the cable system notified KVTN that it would not carry the Station's signal because it was not sufficiently strong. The station asserts that CCC failed to provide sufficient information supporting its claim that KVTN's signal strength was inadequate, and had conducted its mandatory carriage negotiations in bad faith. As a result, KVTN seeks an order from the Commission requiring CCC to commence carriage of the Station and the imposition of sanctions against CCC.

2. CCC filed a "Response" to KVTN's Complaint on November 12, 1993, stating that despite the result reached during the July 9 test, it had determined through additional testing that KVTN was unable to deliver a signal of good quality on a consistent basis. According to CCC, KVTN's representatives experienced difficulty in obtaining the required signal strength levels on July 9, spending four hours adjusting the test equipment before the minimum reading of -45 dBm was reached. CCC states that it conducted the later tests out of concern over the strength of the KVTN signal and after the release of two Commission decisions clarifying the proper signal testing procedures. CCC asserts that the tests conducted on September 14 and 15, 1993, consisted of a series of measurements which revealed that the strength of KVTN's signal was below the standards set in the 1992 Cable Act for commercial UHF stations and concludes that the Commission should deny KVTN's request for carriage. Citing its cooperative conduct during the negotiations, CCC requests denial of KVTN's request for imposition of sanctions. KVTN subsequently filed a "Reply" to CCC's "Response" on November 24, 1993.

3. In response to a letter from the Cable Services Bureau,[1] CCC provided additional information concerning the equipment used during the signal strength tests conducted on September 14 and 15, 1993. Specifically, CCC noted that the tests were measured using a ComSonics Window Lite Signal Meter which was shipped to CCC in June 1993 and which requires calibration only once per year, according to the manufacturer.[2]

4. Pursuant to §614(a) of the Communications Act of 1934, as amended, a cable system's signal carriage obligation includes carriage of certain local commercial television stations.[3] A UHF station does not qualify for such carriage if it fails to deliver to the cable system's principal headend a signal level of -45 dBm at the input terminals of the signal processing equipment, unless the station agrees to be responsible for the costs of delivering to the cable system a signal of good quality.[4] The cable operator bears the burden of demonstrating the lack of a good quality signal being delivered to the system's principal headend.[5] In meeting this burden, the cable operator must show that it has used good engineering practices to measure the signal.[6] Generally, if the test results are less than -51 dBm for a UHF station, we have said that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.[7] In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[8] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: (1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; (2) descriptions of the characteristics of the equipment used, such as antenna ranges and radiation patterns; (3) height of

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[1] *See* Letter from Ronald Parver, Manager, Technical Services Team, Cable Services Bureau, to James S. Blitz, Counsel for CCC (dated September 27, 1994).

[2] Letter from James S. Blitz to Ronald Parver (dated October 17, 1994).

[3] *See* 47 U.S.C. §534(a).

[4] 47 U.S.C. §534(h)(1)(B)(iii). *See also* 47 C.F.R. § 76.55(c)(3).

[5] *See Complaint of Independence Public Media of Philadelphia, Inc. against Suburban Cable TV Co., Inc.*, 8 FCC Rcd 6319 (1993) (*"Independence Public Media"*) and *Complaint of Channel 5 Public Broadcasting, Inc., against WestStar Cable*, 8 FCC Rcd 4953 (1993) (*"Channel 5"*).

[6] *Id.*

[7] *See Independence Public Media*, 8 FCC Rcd at 6319. *See also Channel 5*, 8 FCC Rcd at 4953, n.1.

[8] *See* 47 C.F.R. §76.61.

the antenna above ground level and whether the antenna was properly oriented; and (4) weather conditions and time of day when the tests were done.[9]

5. Both parties agree that the tests of KVTN's signal strength conducted at CCC's headend on July 9, 1993, resulted in a measurement of -45 dBm. However, because the test was conducted prior to the release of the Commission's decisions clarifying the standard for good engineering practices, no series of measurements was taken. Subsequently, CCC conducted a second test on September 14 and 15, 1993, to comply with the applicable standard for good engineering practices. The results of this test indicate that the signal strength of KVTN was below the Commission's standards for a good quality signal. KVTN representatives were informed of the procedures used during the second signal strength test. Because they had provided and installed the antenna used in the July 9 test, KVTN personnel were aware of its technical characteristics. CCC noted in its letter to the Station dated September 16, 1993, the specific make and model of the signal meter used, as well as the time and weather conditions at the time of the test. In addition, in response to the letter from the Commission's Cable Services Bureau, CCC has disclosed the age and calibration information pertaining to the signal meter used during the test.[10] As a result, the test conducted by CCC satisfies our standard for sound engineering practices and establishes that the signal strength of KVTN was below the Commission's standards for a good quality signal.

6. KVTN urges the Commission to consider imposing sanctions upon CCC, because it allegedly conducted its must carry negotiations in bad faith. KVTN points to the further testing performed by CCC "without KVTN personnel present . . . as an indication of CCC's bad faith" in negotiating KVTN's carriage.[11] A comment of a CCC employee concerning his supervisor's attitude toward mandatory carriage was also alleged to be evidence of CCC's bad faith. Contrary to KVTN's arguments, there is no requirement that television station representatives be present during signal strength testing. Moreover, the additional testing conducted by CCC was undertaken pursuant to two Commission decisions elaborating on proper signal quality testing procedures.[12] An isolated comment of this nature during the course of carriage negotiations does not support a finding of bad faith warranting the imposition of sanctions.

7. We find that Station KVTN is not entitled to carriage on CCC's Monticello system since the test results submitted by CCC are sufficient to demonstrate that KVTN's signal is not of good quality at the system's principal headend. In addition, we find that the record in this case does not support the imposition of penalties or forfeitures. Accordingly, the petition filed October 8, 1993, by Agape Church, Inc., licensee of Station KVTN, IS DENIED in accordance § 614(a) of the Communications Act, 47 U.S.C. § 534(a). This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[9] *See Independence Public Media*, 8 FCC Rcd at 6319 and *Channel 5*, 8 FCC Rcd at 4953.

[10] *See* Letter from James L. Blitz to Ronald Parver (dated October 17, 1994).

[11] KVTN Complaint at 6-7.

[12] *See* discussion at para.4 & n.5, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 14, 1994

## SOUTHWESTERN BELL TELEPHONE COMPANY FILES A PETITION FOR CLARIFICATION, OR IN THE ALTERNATIVE, A WAIVER OF THE COMMISSION'S METHOD OF COMPUTING RATES FOR CABLE TELEVISION POLE ATTACHMENTS

### PUBLIC COMMENT INVITED

On August 26, 1994, Southwestern Bell Telephone Company (SWB) filed a petition for clarification, or in the alternative, waiver of the Commission's method of computing rates for cable television pole attachments pursuant to the Pole Attachment Act. That method is set forth in a formula in CC Docket 86-212. SWB states that it became aware of the need for clarification when its computation of 1994 pole attachment rates within Oklahoma resulted in negative numbers for the net cost of bare poles and other figures in the formula. SWB states that these negative numbers are caused by a large net salvage component in the depreciation reserve. SWB explains the large net salvage is due to the escalating cost for the removal of poles. As a result, SWB requests that the Commission clarify its formula for computation of the net cost of a bare pole by removing net salvage from the depreciation reserve component, and clarify that net pole investment is to exclude the net salvage component of the depreciation reserve in order to eliminate negative carrying charges. If it is decided that a general clarification is not appropriate, SWB requests a continuing waiver to calculate all of its pole attachment rates as discussed above.

Parties may file comments on SWB's petition no later than **December 12, 1994**. Replies should be filed by **December 30, 1994**. Comments should reference AAD 94-125. A copy of each pleading should be sent to Thad Machcinski FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies of SWB's petition and any comments will be available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Thad Machcinski at (202) 418-0808.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

KSBW License, Inc. File No.: BRCT-930730KJ

For Renewal of License for
Station KSBW-TV
Salinas, California

**MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY**

**Adopted: September 19, 1994; Released: November 4, 1994**

By the Commission: Commissioner Quello concurring in the result.

## I. INTRODUCTION

1. The Commission has before it for consideration: (i) a license renewal application for the captioned television station in Salinas, California; (ii) a Petition to Deny timely filed on November 1, 1993, by the California State Conference of Branches of National Association for the Advancement of Colored People ("NAACP") and the League of United Latin American Citizens ("LULAC"), through its California State Board of Directors (collectively "Petitioners");[1] (iii) the licensee's opposition; and (iv) the licensee's response to a staff letter of inquiry.

2. The Petitioners allege that the challenged station violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, both organizations request that we conduct an investigation of the station's employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 62 (D.C. Cir. 1978) (*Bilingual*), designate the renewal application for hearing and, thereafter, deny the application. The licensee responds that the Petitioners have presented no evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

## II. PLEADINGS

3. *STANDING.* In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

4. Submitted with the petition is a declaration from Frances Armstrong, a member of the NAACP who states that she is a regular viewer of Station KSBW-TV and that she would be seriously aggrieved if the petition is not granted. Filed with the LULAC petition to deny is a declaration from William Melendez, a member of LULAC. Mr. Melendez states that he is a regular viewer of Station of KSBW-TV and would be seriously aggrieved if the petition is not granted. We find that both statements meet the requirements for standing. Accordingly, we hold that both organizations have petitioner status against Station KSBW-TV. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987); *see also Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

## III. DISCUSSION

5. *PRIMA FACIE CASE.* The Petitioners derived their factual allegations from the licensee's EEO programs and annual employment reports. Review of the licensee's EEO records led us initially to conclude that the Petitioners presented a *prima facie* case against the station demonstrating that unconditional grant of the renewal application would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. Section 309(d)(1). *Astroline, supra.*[2] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual, supra.*

6. Review of the Petitioners' EEO allegations, as well as the licensees' opposition and inquiry responses, leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence of employment discrimination. Thus, grant of the application will serve the public interest. 47 U.S.C. § 309(d)(2); *Astroline, supra.* However, we will grant renewal with appropriate remedies and sanctions because the licensee's overall recruitment efforts were deficient.

7. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the

[1] The Petitioners also challenged the renewal applications of several other California television broadcast licensees. These stations' renewal applications will be reviewed in separate Commission orders.

[2] The licensee was not challenged regarding its efforts directed toward women. Nonetheless, as is our practice in all cases, we reviewed the station's EEO efforts toward women. We found them sufficient.

applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* §§ 73.2080(b) and 73.2080(c).

8. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the renewal application fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), *petition for recon. pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

9. The licensee's renewal application, opposition and inquiry response reveal that the licensee filled 72 full-time, including 63 upper-level vacancies, from June 1, 1990 to November 30, 1993.[3] In its inquiry response, the licensee provided the recruitment sources contacted for 71 vacancies.[4] For these vacancies, the licensee contacted the following sources for the cited number of positions: Local newspapers (3); *Media Line* (7); *Broadcasting & Cable* (3); *Electronic Media* (1); *Media Line & Broadcasting & Cable* (4). For 20 vacancies, the licensee contacted *The Californian, Monterey Herald,* and *El Sol.* In addition to these three sources, the licensee contacted some of the following for 18 vacancies: *SJ Mercury,* KSBW, *SF Examiner,* local newspapers, *Sentinel,* Robert Half Associates, and *Electronic Media.* For the remaining vacancies, the licensee contacted some of the following: Audience, Research & Development Corporation, American Association of Asian American Journalists, Society of Black Journalists, Society of Hispanic Journalists and *Chicano News.*

10. The licensee provided the number, gender and race or national origin of the applicants for only 59 positions;[5] and the number gender and race or national origin of the interviewees for only 56 vacancies. Further, the licensee provided the referral source, gender and race or national origin for only 65 successful applicants. According to the licensee's inquiry response, successful applicants came from: *Monterey Herald* (10); *Media Line* (14), including five Hispanics and one American Indian); *The Californian* (five, including one Hispanic); professional association (one, including one Asian/Pacific Islander); internal reference (four, including one African American); "word of mouth" (seven, including one Hispanic); local newspapers (four, including one American Indian); *Broadcasting & Cable* (seven, including one Hispanic and one American Indian); unsolicited (six, including one Hispanic); American Association of Asian American Journalists (one, including one Asian/Pacific Islander); *Electronic Media* (three); Ron Steiner (two); and Robert Half Associates (one). The licensee apparently attracted minorities to 44 (61%) of the 72 applicant pools, and 41 (56%) of its interview pools, including 38 (60%) of the applicant pools and 35 (55%) of the interview pools for upper-level positions. The licensee hired 15 minorities (nine Hispanics, three American Indians, two Asian/Pacific Islanders, and one Black), all for upper-level positions.[6]

11. Petitioners argue that the station has not complied with our EEO Rule. The Petitioners note a decrease of nine minority upper-level job employees despite an increase of 11 upper-level job employees since KSBW License Inc. acquired the station in 1986. Further, Petitioners argue that during the 12 months preceding the filing of the renewal application, there were only 12 minorities among 41 total hires.[7] Moreover, they contend that the 1988 Renewal Application reflects only five minorities out of 42 full-time hires and that the 1993 Renewal Application reports only one upper-level position among 41 vacancies.[8] Also, the Petitioners note that the station's 1993 Annual Employment reflects 86 upper-level job employees among 97 full-time employees, and that 94 upper-four employees were among 106 total employees (including part-time employees). Finally, the Petitioners argue that while the 1993 Renewal Application identified minority sources, it did not indicate that these sources were contacted for every vacancy, and that it did not list the number of referrals from most recruitment sources.

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[3] The current license term ended on December 1, 1993.

[4] The licensee states that it does not have documentation for the remaining vacancy as the former manager is unable to provide the necessary information.

[5] The licensee contends that it is unable to provide information for the remaining 13 vacancies because these records were given to former managers and cannot be found in existing files.

[6] According to 1980 census data, the Salinas-Seaside-Monterey, CA Metropolitan Statistical Area (MSA), in which the station is located, had a 36.8% minority labor force (4.3% Black, 24.6% Hispanic, 7% Asian/Pacific Islander, 0.9% American Indian). The 1989 Annual Employment Report lists two Blacks (2.27%), ten Hispanics (11.4%), two Asian/Pacific Islanders (2.27%), and one American Indian (1.14%) among 88 full-time employees, including two Blacks (2.53%), nine Hispanics (11.4%), and two Asian/Pacific Islanders (2.53%) among 79 upper-level employees. In its pleadings, the licensee made corrections to its 1990 through 1993 Annual Employment Reports. Taking into account this updated information, the 1990 report reflects three Blacks (3.19%), 15 Hispanics (15.9%), five Asian/Pacific Islanders (5.32%), and two American Indians (2.13%) among 94 full-time employees, including three Blacks (3.57%), 13 Hispanics (15.5%), five Asian/Pacific Islanders (5.95%), and one American Indian (1.19%) among 84 upper-level employees. The 1991 reports lists three Blacks (3.45%), 14 Hispanics (23.2%), five Asian/Pacific Islanders (5.75%), and two American Indians (2.29%) among 87 full-time employees, including three Blacks (3.79%), 12 Hispanics (15.2%), five Asian/Pacific Islanders (6.33%), and two American Indians (2.53%) among 79 upper-level employees. In the 1992 report, three Blacks (3.19%), 12 Hispanics (12.8%), five Asian/Pacific Islanders (5.31%), and two American Indians (2.13%) are listed among 94 full-time employees, including three Blacks (3.53%), 11 Hispanics (12.9%), five Asian/Pacific Islanders (5.88%), and two American Indians (2.35%) among 85 upper-level employees. According to 1990 census data, the Salinas MSA includes 44.9% minorities (4.2% Black, 32% Hispanic, 8% Asian/Pacific Islander, 0.7% American Indian). The 1993 report lists one Black (1.13%), 13 Hispanics (14.8%), five Asian/Pacific Islanders (5.68%), and two American Indians (2.27%) among 88 full-time employees, including one Black (1.26%), 11 Hispanics (13.9%), five Asian/Pacific Islanders (6.32%), and two American Indians (2.53%) among 79 upper-level employees.

[7] Petitioners conclude that there is only a 0.005 probability that KSBW-TV's hiring record can be attributed to chance or inadvertence. Instead, Petitioners contend that the station's hiring record is strongly suggestive of discrimination.

[8] In an amendment to its license renewal application, the station reports 35 upper-four hires among 41 hires during the 12 month period prior to filing the application.

12. In opposition, the licensee states that the Petitioners rely on erroneous information. Contending that the original Annual Employment Reports for the years 1990-1993 were in error, the licensee submitted revised reports for these years.[9] Also, the licensee faults the Petitioners for using 1990 U.S. Census Labor Force data in analyzing the entire license term and argues that the 1993 Annual Employment Report should be evaluated using 1990 statistics, and that 1980 data should be used for all Annual Employment Reports prior to 1993.[10] Moreover, the station contends that the Commission's practice is to examine only the current license term under review and that the Petitioners' discussion of 1986-1988 employment figures relate to the previous license term and are irrelevant. The licensee also asserts that as a result of its EEO program, minorities occupy "numerous visible and influential positions at the station." Finally, the licensee states that with the exception of 1989, the station's full-time minority employment has exceeded the Commission's guideline of 50% of parity and that its minority hiring and promotion exceeds 50% of parity.

13. There are no substantial and material questions of fact warranting designation for hearing. *Astroline, supra.* The licensee hired and employed minorities and there is no evidence of employment discrimination. *See,* n.2 *supra.* In addition, the licensee contacted referral sources, including minority-oriented sources, for some of its vacancies. Therefore, renewal of the license is in the public interest.

14. However, we find KSBW-TV's overall recruitment efforts deficient because minorities were absent from a significant number of the licensee's applicant pools and it failed to contact minority specific sources for over one third of its vacancies. The licensee also failed to maintain adequate records for meaningful self-assessment. 47 C.F.R. § 73.2080.

15. Earlier this year, we adopted a Policy Statement regarding forfeitures to be assessed for violations of our EEO rules. *Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules,* 9 FCC Rcd 929 (1994) ("EEO Policy Statement") (petitions for reconsideration and requests for clarification pending). A court decision issued since the EEO Policy Statement indicated that our general policy statement[11] on forfeitures must be put out for notice and comment. *United States Telephone Ass'n v. FCC,* 28 F.3d 1232 (D.C. Cir. 1994). While the *USTA* case did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the EEO Policy Statement until it is likewise made available to the public for notice and comment.[12] *See, e.g., Petition for Declaratory Ruling by Eagle Radio, Inc.* (filed August 11, 1994); *Letter from Henry L. Baumann to William E. Kennard,* July 13, 1994. We will respond to these concerns in a separate order. In the meantime, we will utilize our pre-January 1994 process of *stare decisis* by relying upon case precedent to resolve the decisional case.

16. Under our previous forfeiture authority, which was prior to December 1989, we used a process of *stare decisis.* We would analogize the cases based on factors such as, but not limited to, station size, number of hiring opportunities, MSA size, recruitment patterns, applicant and interview pools, assessment and record-keeping. Under this approach, in determining appropriate sanctions and/or remedies, we have carefully considered the facts and circumstances of this case in light of pertinent case precedent. We believe that the record in the instant case is similar to, but more egregious than, that of the licensee of KESQ-TV, Palm Springs, California, in *Applications of Certain Television Stations Serving Communities in the State of "California,* 6 FCC Rcd 2340 (1991).[13] The licensee therein used minority sources for 37 of its 70 full-time positions and for 34 of its 56 upper-level positions. KESQ-TV used general recruitment sources for 64 of the 70 full-time positions, and interviewed 161 applicants for 56 upper-level positions, only ten of whom were minorities. In addition, the licensee interviewed 205 applicants, including 13 minorities to fill 70 full-time positions. The licensee hired six minorities, including four Hispanics, for its upper-level staff. On its full-time staff, it hired eight minorities, six of whom were Hispanic. Minorities constituted 23.8% of the labor force for the Riverside - San Bernardino, California MSA. In that case, we concluded that the licensee failed to engage in adequate recruitment and conduct meaningful self-assessment of its EEO program, given the lack of minority applicants and hires. The licensee received a $5,000 Notice of Apparent Liability and reporting conditions.

17. KESQ-TV, although issued in 1991, was decided based on a former forfeiture authority, which was significantly lower.[14] Previously, the forfeiture penalty assessed against a broadcaster could "not exceed $2,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation could not exceed a total of $20,000". In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 100-239, 103 Stat. 2131. Pursuant to Section 503(b)(2), the forfeiture penalty assessed against a broadcaster may "not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act". However, even before our forfeiture authority was expand-

[9] KSBW-TV asserts that errors in the original Annual Employment Reports resulted from its efforts to protect the privacy interests of its employees. Specifically, the station states that it attempted to identify ethnicity through appearance and/or surnames. However, the licensee indicates that it no longer relies on this approach in identifying ethnicity. We caution the licensee to use more care in collecting and reporting the race of its employees. As an example, the licensee may obtain race data through employee self-identification.

[10] We will apply 1980 census data to the 1989-1992 Annual Employment Reports. As the Commission has announced previously, we began using 1990 labor force statistics for license renewal applications due to be filed after May 31, 1993 and for 1993 Annual Employment Reports. *See* Public Notice dated April 12, 1993.

[11] *Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *revised,* 8 FCC Rcd 6215 (1993).

[12] The Commission has, however, received authority to assess higher forfeitures for violations of its rules. Pub. L. No. 100-239, 103 Stat. 2131.

[13] The Riverside - San Bernardino, California MSA had an available labor force of 23.8% minority (4.2% Black, 17.0% Hispanic and 2.6% Other).

[14] Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b)(2), authorizes the Commission to impose monetary forfeitures on broadcast station licensees or permittees for violations of the Act or of regulations promulgated thereunder.

ed in 1989, we assessed substantial fines for EEO recruitment deficiencies. *See e.g., Kansas City Youth for Christ*, 3 FCC Rcd 6866 (1988) (licensee received $10,000 forfeiture, short-term renewal and reporting conditions for failure to self-assess and make any efforts to recruit women or minorities); *In re Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990) (licensee received $10,000 forfeiture, short-term renewal and reporting conditions where it failed to hire minorities for upper-level positions in a 6 1/2 year period, and did not use recruitment sources which generated minority referrals); *Commission's Letter to John P. Healy, Treasure Coast Radio, Inc.*, 5 FCC Rcd 3745 (1990) (licensee received $10,000 forfeiture and reporting conditions where its recruitment efforts attracted no minority candidates in labor market with a 12.5% Black labor force, and its records did not show any contacts with minority organizations or hires during a two year period). These deficiencies are somewhat more egregious than those in the instant case. Consequently, the amount assessed in the instant case is lower in proportion to our current forfeiture authority ($250,000) than the amount in the cited cases was to our previous forfeiture authority ($20,000).

18. The record in this case indicates that the licensee recruited for 71 jobs and that minorities were present in only 44 applicant pools and 41 interview pools. In addition, KSBW-TV failed to contact minority sources for 25 (over one-third) of its vacancies. Further, it failed to maintain adequate records for meaningful self-assessment. The licensee provided applicant pool data for only 59 of its 72 vacancies and interview pool information for only 56 of its 72 positions. The licensee hired 15 minorities (nine Hispanics, three American Indians, two Asian/Pacific Islanders, and one Black), all for upper-level category jobs during the review period. As the licensee correctly indicates, absent exigent circumstances, we examine only the reporting years of the current license term. The Salinas MSA included 36.8% minorities from 1989 to 1992 and 44.9% minorities in 1993.

19. We believe that the facts in the instant case are similar to, but more egregious than, those in KESQ. Its location in an extremely significant MSA of 36.8% minorities for the years 1989 to 1992 and 44.9% minorities in 1993 should have prompted KSBW-TV to increase its outreach efforts to include use of minority specific sources whenever vacancies occurred. Also, the licensee did not provide complete applicant and interview pool data. We believe that maintaining such information would better enable the licensee to self-assess the effectiveness of its recruitment efforts. Further, the station experienced a very large hiring cycle during the last three years of the license term, which could have translated into increased numbers of minority applicants. Given the facts of this case, broadcasters' familiarity with our long standing EEO rule, as well as our expanded forfeiture authority in this area, we feel that the circumstances in this case justify issuance of a Notice of Apparent Liability for $15,000. Accordingly, we will grant renewal subject to reporting conditions as set forth below and issue a Notice of Apparent Liability for $15,000.

## IV. CONCLUSION

20. Upon review of the record and the arguments submitted by all parties, we find no hearings are warranted and that renewal of the license is appropriate. However, we will grant the renewal subject to reporting conditions and issuance of a Notice of Apparent Liability for $15,000.[15]

## V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, that the Petition to Deny filed by the California State Conference of Branches of the NAACP and LULAC against the renewal application of KSBW-TV IS DENIED.

22. IT IS FURTHER ORDERED, that the license renewal application for Station KSBW-TV IS GRANTED subject to reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $15,000.

23. IT IS FURTHER ORDERED that the licensee of KSBW-TV submit to the Commission an original and one copy of the following information on August 1, 1995, August 1, 1996, and August 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time vacancies during the 12 months preceding the respective reporting dates, indicating the job title and FCC job category of the position, the race or national origin, sex and the referral source of each applicant for each and the race or national origin and sex of the person hired. These lists should also note which recruitment sources were contacted;[16]

(b) A list of employees as of the July 1, 1995, payroll period for the first report, a list of employees as of the July 1, 1996, for the second report, and a list as of the July 1, 1997 payroll period for the third report by job title and FCC job category indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin;

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

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[15] In view of the pending assignment application for KSBW-TV, we note that upon grant of that application, reporting conditions will follow the license as a matter of law and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[16] Such a list might start:

(1) News Director; Officials and Managers;

| Full-time | | |
|---|---|---|
| 3 Applicants: | 1 White female | A.W.R.T. |
| | 1 Black male | Urban League |
| | 1 Black female | NAACP |

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: Black male (03/15/94)

24. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail - Return Receipt Requested – one copy of this Memorandum Opinion and Order to all parties.

25. The reports are to be filed with the Acting Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch (202-632-7069).

26. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch (202-632-7069). With respect to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

PUBLIC NOTICE

Released: November 7, 1994

## FCC ASKS FOR COMMENTS AND NOMINATIONS FOR MEMBERSHIP REGARDING THE ESTABLISHMENT OF AN ADVISORY COMMITTEE TO NEGOTIATE REGULATIONS

1. The Commission hereby seeks comment on establishing an Advisory Committee to negotiate regulations to specify the requirements for hearing aid compatible (HAC) telephones in workplaces, hospitals, certain other health care facilities, prisons, hotels and motels. The negotiations are to assist the Commission in developing regulations that, among other things, will determine whether to lift the suspension of enforcement of Sections 68.112(b)(1), (3), and (5) of the Commission's Rules. 47 C.F.R. §§ 68.112(b)(1), (3), (5). Those sections require that all telephones in all workplaces, hospitals, certain other health care facilities, prisons, hotels and motels be hearing aid compatible by May 1, 1993 for establishments with 20 or more employees and by May 1, 1994 for establishments with fewer than 20 employees. *See Access to Telecommunications Equipment and Services by the Hearing Impaired and Other Persons with Disabilities,* Report and Order, CC Docket No. 87-124, 7 FCC Rcd. 3472 (1992). The negotiating committee would be created under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and the Negotiated Rulemaking Act of 1990 (NRA), Pub. L. 101-648, November 28, 1990, and would consist of representatives of the interests that will be significantly affected by these rules.

2. On April 13, 1993, the Commission suspended until further notice enforcement of the requirement adopted in 1992 that all telephones in all workplaces employing 20 or more persons be hearing aid compatible by May 1, 1993. In addition, the Commission also suspended enforcement of the requirement that all telephones in workplaces employing fewer than 20 employees be hearing aid compatible by May 1, 1994. The Commission suspended enforcement of other requirements that telephones in all hospitals, certain other health care facilities, prisons, hotels and motels be hearing aid compatible by May 1, 1993 for establishments with 20 or more employees, and by May 1, 1994 for establishments with fewer than 20 employees. The Commission suspended enforcement of the rules for these telephones only if an alternative means of signalling life-threatening situations is available in such confined settings. The Commission previously had required telephones in workplace common areas, at the work stations of employees with hearing disabilities, and in areas where emergencies might require HAC telephones to be HAC.

Shortly before the effective date of the more stringent regulations, the Commission received numerous complaints from organizations alleging an inability to meet the deadline. The complaints raised legal and practical problems with the new HAC requirements, asserting that the number of phones to be retrofitted and the cost of doing so were much greater than originally envisioned and that retrofitters were unable to meet the demand. Some stated that they would be forced to remove telephones from use altogether to avoid violating HAC requirements, raising safety concerns. Finally, many claimed that the new retrofitting requirements violated the Hearing Aid Compatibility Act of 1988, which prohibits the Commission from requiring the retrofitting of any telephones other than coin-operated telephones or those provided for emergency use.

On May 12, 1993, the Alexander Graham Bell Association (the Association) filed an Emergency Request to Reinstate Enforcement of the rules. The Association argues that the suspension of enforcement violated section 553(b)(3) of the Administrative Procedure Act. Seventeen parties filed in opposition to the petition, and six parties filed in support of the petition, which is pending before the Commission.

### I. REGULATORY NEGOTIATION

3. Regulatory negotiation is a technique through which the Commission seeks to develop better regulations in a less adversarial setting. Negotiations are conducted through an Advisory Committee chartered under FACA. The goal of the Committee is to reach consensus on the language or substance of appropriate rules. If a consensus is reached, it is used as the basis of the Commission's proposal. All procedural requirements of the Administrative Procedure Act (APA) and other applicable statutes continue to apply.

4. When making a determination regarding the suitability of a proceeding for the negotiated rulemaking process, the Commission must consider whether:

(a) there is a need for the rules to be developed;

(b) there are a limited number of identifiable interests that will be significantly affected by the rules;

(c) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (1) can adequately represent the identifiable interests and (2) are willing to negotiate in good faith to reach a consensus on the proposed rules;

(d) there is a reasonable likelihood that a committee will reach a consensus on the proposed rules within a fixed period of time;

(e) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of final rules;

(f) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee, and

(g) the agency will, to the maximum extent possible consistent with the legal obligations of the agency, use the consensus of the committee with respect to the proposed rules as the basis for the rules proposed by the agency for notice and comment. Negotiated Rulemaking Act Sec. 3, 5 U.S.C. Sec. 583(a).

## II. SUBJECT AND SCOPE OF RULE FOR NEGOTIATED RULEMAKING

5. The Commission proposes that the regulations specifying the requirements for hearing aid compatible telephones in all workplaces, hospitals, certain other health care facilities, prisons, hotels and motels be developed through negotiation. We believe that the selection criteria listed above are met. The suspension of enforcement of the Commission's HAC regulations must be clarified, removed, or modified in a further notice of proposed rulemaking. The parties whose interests are affected are identifiable from comments filed in this proceeding. We believe that these interests can be adequately represented on a committee, and that representatives will act in good faith to reach a consensus on technical rules within a prescribed time. We believe that the negotiated rulemaking process will use public and private resources more efficiently than the submission of additional written comments. We have adequate resources to commit to this endeavor and would use the consensus report of the committee to develop proposed rules.

6. The Commission has identified the following primary issue that should be addressed in the negotiations and resolved in the proposed rules developed by the Committee:

> Whether to lift the suspension of enforcement of Section 68.112(b)(1), (3), and (5) of the Commission's Rules and require that all telephones in all workplaces, hospitals, certain other health care facilities, prisons, hotels and motels be hearing aid compatible by a specific date.

If the Negotiated Rulemaking Committee is able to reach consensus on the primary issue, we ask that it propose specific rules. We ask the Committee to provide an analysis of how the benefits of these proposed regulations outweigh other options. Specifically, we ask the Committee to explain and provide:

- a definition of "telephones provided for emergency use" at the workplace, hotels, motels, and hospital facilities;
- the timeline for implementing any new requirements, including whether establishments with fewer than 20 employees should be given additional time to comply with the requirements;
- the costs and benefits of implementation;
- any other available data concerning the effects on economic growth expected to result from the implementation of the regulations;
- the impact of its recommendations on access to telecommunications services;
- an analysis of technological alternatives to HAC retrofitting; and
- an analysis of: the general applicability of HAC requirements to cellular telephony; whether telephones in airplanes, trains, automobiles and other non-traditional workplaces should be hearing aid compatible; and whether headset telephones should be hearing aid compatible.

Other issues may be included by the parties.

## III. POTENTIAL INTERESTS AND PARTICIPANTS

7. The Commission has identified the following interests as those most likely to be significantly affected by the proposed rules:

> (a) individuals and organizations representing small and large businesses, government agencies, universities, hospitals, hotels, motels, and non-profit institutions;
>
> (b) equipment manufacturers and common carriers providing telephone service;
>
> (c) advocates for persons with hearing disabilities.

8. The following have tentatively been identified as potentially affected interests should the Commission proceed with a negotiated rulemaking: the Alexander Graham Bell Association; Utilities Telecommunications Counsel; the North American Telecommunications Association; the Direct Marketing Association; the National Center for Law and Deafness, Gallaudet University; Goodwill Industries of Seattle Washington; Telecommunications for the Deaf, Inc.; the United States Telephone Association; the National Association for the Deaf; Self Help for Hard of Hearing People; Southern New England Telephone Company; GTE Service Corporation; the American Speech-Language-Hearing Association; Maryland Office of People's Counsel; the New York League for the Hard of Hearing; Arizona Counsel for Hearing Impaired; the Association of Colleges and University Telecommunications Administrators; the International Telecommunications Association; the Food Marketing Institute; the American Petroleum Institute; the Tele-Communications Association; the National Retail Federation; the Newspaper Association of America; the National American Wholesale Grocers Association; the Equal Employment Advisory Council; the American Consulting Engineers Council; the New York Clearing House Association; and the Domestic Facilities Division, Common Carrier Bureau, Federal Communications Commission.

## IV. FORMATION OF THE NEGOTIATING COMMITTEE

### A. Procedure for Establishing an Advisory Committee

9. Under FACA, an Advisory Committee may be established only after consultation with the General Services Administration (GSA) and the filing of a charter with Congress. The Commission will prepare a charter and initiate the requisite consultation process prior to formation of the Committee and the commencement of negotiations.

### B. Participants

10. The number of participants in the group is estimated to be about 20 and should not exceed 25. A greater number of participants could make it difficult to conduct efficient negotiations. Each interest will have the opportunity to be adequately represented, although this does not necessarily mean that each potentially affected entity will have its own representative. Further, we must be satisfied that the group, as a whole, reflects a proper balance and mix of interests. In this respect, we are especially interested in receiving nominations to participate from public interest advocacy groups, user groups, and educators and academics.

11. Entities that will be significantly affected by the proposed rules and that believe that their interests will not be adequately represented by any entity specified in paragraph 8 above, may apply for, or nominate another entity for, membership on the Committee. Each application for nomination must include:

(a) the name of the applicant or nominee and a description of the interests the entity will represent,

(b) evidence that the applicant or nominee is authorized to represent parties related to the interests the entity proposes to represent,

(c) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rules under consideration,

(d) the reasons that the entities specified in paragraph 8 do not adequately represent the interests of the entity submitting the application or nomination.

12. If, in response to this *Notice*, any additional entities request membership or representation in the negotiating group, the Commission will determine whether that entity should be added to the group. The Commission will make that decision based on whether the entity would be substantially affected by the rule and whether that entity is already adequately represented in the negotiating group.

**C. Agenda**

13. If the Commission decides to establish a negotiating committee and its charter is approved, it is anticipated that the Committee's first meeting will take place later this year, at the Commission's offices, Washington, D.C., at a room, date, and time that will be announced. At this initial meeting, the Committee will complete action on all procedural matters and establish a target date for submission of its recommendations. We expect that the target date would be no later than 45 days from the initial meeting of the Committee. We anticipate adoption of a Further Notice of Proposed Rulemaking no later than 60 days after the submission of the Committee's recommendations.

## V. NEGOTIATION PROCEDURES

14. The following procedures and guidelines will apply to the Committee, if formed. These procedures may be modified, however, after reviewing the comments received in response to this *Notice* or during the negotiation process.

**A. Facilitator**

15. The Commission will nominate a person to serve as a neutral facilitator for the negotiations of the Committee, subject to the approval of the Committee by consensus. The facilitator will not be involved in the substantive development of the regulations. The facilitator's roles are to: (1) chair negotiating sessions; (2) help the negotiation process run smoothly; (3) assist participants in defining and reaching a consensus; and (4) manage record-keeping and minute-keeping.

**B. Good Faith Negotiations**

16. Since participants must be willing to negotiate in good faith, each organization -- including the Commission -- must designate a qualified individual to represent its interests. Linda B. Dubroof, Acting Branch Chief, Domestic Facilities Division, Common Carrier Bureau, will be the Commission's representative.

**C. Meetings and Compensation**

17. Meetings will be held in the Washington, D.C. area at the convenience of the Committee. The Commission, if requested, will provide the facilities needed to conduct the meetings, and will provide any necessary technical support. Private sector members of the Committee will serve without government compensation or reimbursement of expenses. Private sector members will not be special government employees for any purposes whatsoever.

**D. Committee Procedures**

18. Under the general guidance and direction of the facilitator, and subject to any applicable legal requirements, the members will establish the procedures for committee meetings.

**E. Consensus**

19. The goal of the Committee is consensus. The Negotiated Rulemaking Act defines consensus as unanimous concurrence among the represented interests, although the Act permits the Committee to agree to another specified definition. In the event the Committee is unable to reach a consensus, the Committee may include in a report any other information, recommendations, or materials that the Committee considers appropriate, and any Committee member may include as an addendum to the report additional information, recommendations, or materials. Parties to the negotiation may withdraw at any time. If this happens, the remaining Committee members and the Commission will evaluate whether the Committee should continue.

**F. Record of Meetings**

20. Pursuant to FACA, the Committee will keep a record of all committee meetings. This record will be placed in the public docket for this rulemaking (CC Docket No. 87-124). The Commission will announce committee meetings in the Federal Register. These meetings will be open to the public.

## VI. CONCLUSION

21. The Commission requests public comment on whether: (1) it should establish a Federal Advisory Committee, (2) it has properly identified the interests that are significantly affected by the key issues listed above, (3) the suggested committee membership reflects a balanced representation of these interests, and (4) regulatory negotiation is appropriate for this rulemaking.

22. Pursuant to the applicable procedures set forth in Section 4(c) of the Negotiated Rulemaking Act of 1990, 5 U.S.C. Section 584(c), interested parties may file comments and nominations for Committee membership on or before thirty days from Federal Register publication of this notice. Comments and/or nominations should be sent to the Office of the Secretary, CC Docket No. 87-124, Federal Communications Commission, Washington, D.C. 20554. Comments and nominations will be available for public inspection during regular business hours in the Commission's Reference Center, Room 239, 1919 M St., N.W., Washington, D.C. 20554.

23. For further information pertaining to the establishment of the negotiation committee and associated matters, contact John Walker, Common Carrier Bureau, 2025 M Street, N.W., Washington, D.C. 20554, (202) 634-1820 or (202) 632-0484 (TTY).

24. Action by the Commission October 31, 1994, by Public Notice (FCC 94-280) by Chairman Hundt, Commissioners Quello, Barrett, Ness, and Chong.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 94-128**

In the Matter of

Open Network Architecture Tariffs
of US West Communications, Inc.

## ORDER DESIGNATING ISSUES FOR INVESTIGATION

**Adopted: November 4, 1994; Released: November 8, 1994**

By the Chief, Common Carrier Bureau:

### I. INTRODUCTION AND BACKGROUND

1. In the *Part 69 ONA Order*, the Commission adopted rules requiring the Bell Operating Companies (BOCs) to implement open network architecture (ONA).[1] The Commission's ONA rules require BOCs providing enhanced services to make regulated basic services available to enhanced service providers on the same basis as they use those basic services in the provision of their own enhanced services.[2] One purpose of requiring implementation of ONA was to unbundle basic services provided by the BOCs to promote the efficient and innovative use of the network by enhanced service providers. Another purpose of implementing ONA was to prevent the BOCs from cross-subsidizing enhanced services with revenues from regulated services or discriminating against independent enhanced service providers in favor of their enhanced service operations. This latter purpose was to be achieved through non-structural safeguards that replaced prior rules, which had required BOCs that offered enhanced services to do so through a separate subsidiary.[3] In its *Computer III Inquiry*, the Commission had found that structural separation could create inefficiencies in the provision of enhanced services, and that ONA could provide the same measure of protection against anticompetitive behavior without creating such inefficiencies.[4]

2. The *Part 69 ONA Order* required the BOCs to file tariffs to provide ONA services. Specifically, the Commission ordered the BOCs to unbundle optional service offerings from their existing feature group access arrangements.[5] These optional service offerings are known as "basic service elements." Basic service elements were distin-

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[1] Amendments to Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*), *modified on recon.* 7 FCC Rcd 5235 (1992), *further modified on recon.* 8 FCC Rcd 3114 (1993). The Bell Operating Companies include the Ameritech Operating Companies, (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West). Later, the Commission extended its ONA rules to GTE Corporation (GTE). Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92h)256, 9 FCC Rcd 4922 (1994) (*GTE ONA Order*).

[2] Amendments of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958, 1063-64 (1986); *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), Amendments of Sections 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 2 FCC Rcd 3072 (1988) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (*Phase II Reconsideration*), *vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (*Computer III Inquiry*). *See also GTE ONA Order*, 9 FCC Rcd at 4923-24 (para. 2). The Commission's Rules define enhanced services as communications services that employ computer processing applications that act on the "format, content, code, protocol, or similar aspects of the subscriber's transmitted information." Section 64.702(a) of the Commission's Rules, 47 C.F.R. § 64.702(a). Basic services are communications services which are not enhanced.

[3] *Part 69 ONA Order*, 6 FCC Rcd at 4525 (para. 2).

[4] *See Computer III Inquiry*, 104 FCC 2d at 1011-12. Finding that the Commission had not adequately justified its conclusion that non-structural accounting safeguards would be adequate to prevent cross-subsidization, the Court of Appeals for the Ninth Circuit remanded the Orders adopting the ONA rules. People of the State of California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (*California I*). On remand, in November 1991, the Commission adopted stronger accounting safeguards. Computer III Remand Proceedings: Bell Operating Safeguards and Tier I Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*Computer III Remand Order*). On review of the *Computer III Remand Order*, the Court noted that the Commission based its decision to abandon structural safeguards in favor of ONA on a cost-benefit analysis that assumed that ONA would constitute more fundamental unbundling of access services than has turned out to be the case. The Court remanded the *Computer III Remand Order* to re-examine its cost-benefit analysis. People of the State of California v. FCC, slip. op., No. 92-70083 (Oct. 18, 1994) (*California III*). Previously, the Court had found that the Commission had adequately justified its change in policy to no longer require fundamental unbundling. People of the State of California v. FCC, 4 F.3d 1505, 1511-13 (9th Cir. 1993) ( *California II*). At issue in this investigation is whether the ONA rates filed by US West are consistent with the Commission's ONA policy. The Court has not found the Commission's ONA policy itself to be unreasonable; rather, it held only that the Commission has not yet shown that ONA, without fundamental unbundling, justifies adoption of nonstructural safeguards. We conclude that the Court's remand of the *Computer III Remand Order* does not directly affect our investigation of US West's ONA rates.

[5] There are four different types of feature group arrangements that interexchange carriers may order from local exchange carriers to gain access to their networks. Feature Group A access provides connections on the line side of the switch. With this service, callers wishing to use an interexchange carrier's service must dial additional telephone numbers and access codes after being connected to the interexchange carrier's switch. The transmission quality associated with this type of access is gen-

guished from essential, underlying switching and transmission services offered by the BOCs, which are called "basic serving arrangements."[6]

3. Implementing ONA requires development of reasonable basic service element rates, which in turn requires some rational means for apportioning joint and common switch investment among basic service elements. In the ONA context, the Common Carrier Bureau (Bureau) concluded that any reasonable method of apportioning switching costs would require development of an investment cost allocation model, which a carrier would use to allocate investment in switches to correspond to its use of the switch to provide each basic service element.[7] Therefore, the BOCs used computer models to develop investment data on which to base the unbundled basic service element rates.[8]

4. Specifically, Bell Communications Research, Inc. (Bellcore) and US West have developed several cost models that BOCs use to determine the investment required to produce one unit of a service. These models analyze switching equipment to determine how much investment is required to produce one unit of a particular basic service element. The BOCs then multiply that per unit investment by annual direct cost factors to determine the annual direct costs required to support the investment. Direct costs, which are predominantly capital costs and other plant-specific costs, are closely linked to direct investment. Therefore, the BOCs used their internal company records to develop the direct cost factor, which they applied to per unit investment to determine the amount of direct costs to be recovered from each service.[9] Overhead costs are costs that are not linked to a specific service. BOCs calculate overhead costs to be recovered from a specific service by developing an overhead loading factor and applying it to direct costs.[10]

5. The Bureau allowed the BOCs' ONA tariffs to take effect subject to a one day suspension and an investigation.[11] With respect to all the BOCs except US West, that investigation was completed in December 1993.[12] Unlike other BOCs, which used one computer model for all their basic service element rates, US West developed the costs underlying the rates in its first ONA filing from two separate software models that were not consistent with each other.[13] US West relied in part on a computer model it developed, the "Switching Cost Model" (SCM), to determine its basic service element investment costs, and in part on a 1987 version of the model used by the other six BOCs, the "Switching Cost Information System" (SCIS).[14] The absence of a uniform methodology not only created the possibility of inconsistent cost allocations, but was also contrary to the requirements of the *Part 69 ONA Order*. The Commission therefore required US West to file replacement rates rectifying this and other problems.[15]

6. US West filed the replacement ONA rates under Transmittal No. 446 on January 26, 1994. Although US West relied exclusively on one computer model, a revised version of SCM,[16] it was not clear whether or how these revisions affected the per unit investment figures produced by the model.[17] We therefore suspended Transmittal No. 446 for one day, and initiated an investigation. In this Order, we designate issues in this investigation and address certain procedural issues.

## II. DESIGNATION OF ISSUES

7. US West supports its rates in Transmittal No. 446 with two conflicting sets of workpapers that we could not reconcile. One set shows development of the tariffed rates but does not appear to account for significant direct costs; the other includes more direct costs, but does not include common costs and overhead costs in its development of rates for basic service elements. When Bureau staff tried to develop basic service element rates using the direct costs in this set of workpapers, we could not reproduce the rates in Transmittal No. 446. Because US West appears to have

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erally inferior to that associated with other access arrangements. With Feature Group B, the interexchange carrier is connected to the trunk side of the switch and has better transmission quality than Feature Group A offers. However, Feature Group B still requires callers to dial an additional access code after connection to the interexchange carrier's switch to complete their long distance calls. Feature Groups C and D, which are also trunk side connections, have the best available transmission quality and provide for direct connection to the switch without an access code. Callers merely have to dial "1" before dialing a regular ten-digit telephone number. *See, e.g.*, National Exchange Carrier Association Tariff F.C.C. No. 5, §§ 6.5.1, 6.6.1, 6.7.1, 6.8.1. 1

[6] *See Part 69 ONA Order*, 6 FCC Rcd at 4526 (para. 8).

[7] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 521, 523-24 (para. 17) (Com. Car. Bur. 1991) (*SCIS In Camera Order); review denied*, 8 FCC Rcd 422 (1993).

[8] These computer models rely upon proprietary information provided by switch manufacturers. The Commission therefore concluded that these models were exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (FOIA). The Commission's concern was that disclosure might cause switch manufacturers to stop providing this proprietary information, which would make it difficult or impossible to develop the computer models. This, in turn, would adversely affect the Commission's ONA program. Allnet Communications Services, Inc., FOIA Control No. 92-266, 7 FCC Rcd 6329, 6330-31 (paras. 14-17) (1992) ( *Allnet FOIA Review Order), aff'd.* Allnet Communications Services, Inc. v. FCC, 800 F. Supp. 984 (D.D.C. 1992), *aff'd.* Allnet Communications Services, Inc. v. FCC, No. 92-5351, slip op. (D.C. Cir. May 27, 1994).

[9] *See* Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 9 FCC Rcd 440, 456 (paras. 44-45) (1993) (*ONA Final Order), recon. pending.* By "unit investment" we mean the investment required to produce one unit of the basic service element at issue.

[10] *Id.*

[11] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, 7 FCC Rcd 257 (Com. Car. Bur. 1991) (*Ameritech ONA Tariff Order), modified by* Ameritech Operating Companies, 7 FCC Rcd 948 (Com. Car. Bur. 1992); Bell Atlantic Telephone Companies, *et al.*, Open Network Architecture Tariffs, 7 FCC Rcd 1512 (Com. Car. Bur. 1992) (*ONA Investigation Order).*

[12] *See ONA Final Order*, 9 FCC Rcd at 440.

[13] *ONA Final Order*, 9 FCC Rcd at 461-62 (paras. 56-59).

[14] *Id.* at 461 (para. 56). For a brief description of the SCM "core" model and SCM "feature" model, see *infra* note 14.

[15] *Id.* at 463 (paras. 61-63). One additional problem with US West's filing was that some factual materials upon which US West had relied were seriously outdated. *Id.* at 461-62 (para. 58).

[16] US West Transmittal No. 446, Description and Justification (D&J), at 2-1.

[17] US West Communications, Inc., Open Network Architecture Tariffs, 9 FCC Rcd 2522, 2522 (para. 3) (Com. Car. Bur. 1994) (*US West ONA Suspension Order).*

used two different and inconsistent procedures in its development of its replacement ONA rates, we cannot determine whether those rates are reasonable. Therefore, we direct US West to submit a single, integrated series of workpapers as part of its direct case. In addition, in order to determine whether US West's replacement ONA rates comply with the *ONA Final Order*, we designate for investigation the three issues listed below. As in the initial ONA investigation, our focus here is on determining whether and the extent to which US West's ONA rates are based on unreasonable and unlawful ratemaking practices.[18]

**Issue A. Has US West Corrected the Ratemaking Deficiencies Identified in the ONA Final Order With Respect to Developing Unit Investment Figures?**

**1. Model office development.**

8. The *ONA Final Order* notes that US West used only central offices from its central region to develop model offices for the "Make Busy Key" and "Message Delivery" basic service elements, rather than including central offices from throughout its service area. The *ONA Final Order* found that the rates for those basic service elements were unreasonable on that ground, because there was no evidence that such a limited subset of US West's central offices would accurately reflect its actual costs in providing those basic service elements.[19] The cost support provided with Transmittal No. 446 fails to state whether it consistently used all central offices in developing model offices rather than only those in its central region.[20] Accordingly, US West should specify whether all switching offices were used to develop the model office and, if any switching offices were excluded, provide the rationale for their exclusion.

**2. Outdated traffic studies, vendor operating software, and vendor data.**

9. The *ONA Final Order* states that US West did not rely on traffic studies recent enough to reflect accurately current traffic patterns.[21] In addition, the Order finds that US West's rates were also unreasonable because they were based on outdated vendor software and associated vendor data, and therefore not adequately based on US West's current costs of providing service.[22] The Transmittal No. 446 cost support states that the SCM "has been updated to include 1993 rate levels and traffic data," but provides no description of traffic studies conducted since the outdated studies relied on for the original ONA rates.[23] Similarly, the cost support indicates that SCM now "includes the most current data on switching technology," but fails to specify the date of vendor data or the version of operating software incorporated for the various kinds of switches included within SCM.[24]

10. Accordingly, US West should specify the scope and date of traffic studies relied on by Transmittal No. 446 that supersede older traffic information, as well as the procedure used to conduct the studies. US West should also describe the more recent vendor data and software incorporated within the updated SCM software, itemized for each switch technology. For each deficiency identified in the *ONA Final Order* that US West asserts it has corrected, US West should show the effect of the correction on the unit investment figures developed using the updated SCM software. US West should also describe the cumulative effect of all corrections US West made in response to the *ONA Final Order* for each basic service element. Finally, US West should explain its statement in the Transmittal No. 446 Description and Justification that 1993 rate levels have been included in SCM.[25]

**Issue B. Is it Possible to Develop Reasonable Rates Using Revised SCM Software?**

11. US West asserts that the "core" of its SCM software was reviewed in the original investigation by the independent auditor, Arthur Andersen and Company, and has not been significantly altered since. Therefore, states US West, it need not be further reviewed here.[26] In the *US West ONA Suspension Order*, the Bureau found US West's assertion to be unpersuasive in light of its revisions to SCM.[27] Furthermore, given the relatively recent submission of documentation for the updated SCM model, we have not conducted significant *in camera* review of the model,[28] as we did in the earlier model in the previous ONA investigation. Therefore, it is not clear that SCM, as revised, can be made to produce reasonable unit investment data on which reasonable ONA rates can be based.

12. We can determine whether the updates to SCM have significant effects on unit investment, and thus on ONA rates, in one of two ways. First, we can compare the

[18] *ONA Final Order*, 9 FCC Rcd at 445-46 (para. 11-12).
[19] *Id.* at 448 (para. 18).
[20] Transmittal No. 446, Description and Justification (D&J) at 2-1 through 2-5.
[21] *ONA Final Order*, 9 FCC Rcd at 450 (para. 22).
[22] *Final Order*, 9 FCC Rcd at 461-62 (para. 58).
[23] Transmittal No. 446 D&J at 2-1.D
[24] *Id.*
[25] "USWC exclusively used the SCM model that has been updated to include 1993 rate levels and traffic data." Transmittal No. 446 D&J at 2-1. Presumably, US West used some cost model to develop its 1993 rate levels. It is not clear whether or to what extent US West has manipulated its 1993 rate levels, or what effect those manipulations might have on the unit investment data produced by the revised SCM. Thus, US West's statement raises the concern that its cost model has been somehow modified to reflect predesignated rates.
[26] Letter from Cyndie Eby, US West, to Gregory J. Vogt, Chief, Tariff Division, Apr. 11, 1994. SCM is a two part model. The first part of SCM is the "core" model, which calculates unit investment associated with the common parts of the switch, *i.e.*, investment not attributable to any one specific feature or function. Those results are then input into the second part of SCM, the "features" model, which develops the additional investment required to support specific features and calculates unit investment that includes both common and feature-specific investment.
[27] *US West ONA Suspension Order*, 9 FCC Rcd at 2522 (para. 3).
[28] In the first ONA investigation, we required Ameritech to submit its SCIS model, so that we could examine it *in camera*. The requirement was later expanded to include all the BOCs' models. Through this examination, we were able to determine the extent to which the SCIS model is proprietary and therefore exempt from mandatory public disclosure under FOIA. We were also able to identify some of the most significant ways that the model can be adjusted to reflect different assumptions BOCs can make regarding their networks. *SCIS In Camera Order*, 7 FCC Rcd at 524 (para. 18).

updated SCM software and documentation with the original version by a second, full-scale audit. Alternatively, we can run the same set of data through both models, each set to incorporate the same model assumptions,[29] and identify any differences on unit investment outputs. We have decided as an initial matter to require US West to conduct such comparative investment studies. Specifically, we direct US West to show the effect of any SCM software revisions on unit investments, and to demonstrate the reasonableness of the revisions. Second, the equations within the SCM model include variables that enable US West to adjust the model to fit assumptions it makes concerning its network. US West must quantify the effects of changes in any such assumptions not specified in the original *ONA Designation Order* on SCM unit investments. US West should demonstrate, by giving examples, what effect changes in these factors have upon unit investment studies. Finally, US West must show all sources of rate variation between the originally filed rates and those filed under Transmittal No. 446, and isolate rate differences attributable to SCM software changes from those arising from other sources.

13. As explained below, we also require US West to hire an independent auditor to review the revised SCM model. We hereby direct that auditor to review US West's comparison of old and new SCM. After reviewing US West's comparisons and the results of the independent auditor's review of that comparison, we will examine US West's contentions that the initial auditor's review should suffice for this proceeding. Also, if necessary, we will designate additional issues for investigation concerning the operation of the model itself.

**Issue C. Has US West Complied with the Instructions of the ONA Final Order with Respect to Including Analog Switching Equipment in its Switch Technology Mix?**

**1. Inclusion of Analog Switch Equipment.**

14. Each basic service element rate is based on a weighted average of the costs of providing the service through use of different kinds of switches in the BOC's network.[30] An important issue in the first ONA investigation was whether it was reasonable to include the costs of analog switches in this weighted average.[31] Analog switches are based on much older technology than digital switches, and in many cases, use of analog switches results in higher basic service element costs than use of digital switches would impose.[32] The Commission concluded that basic service element rates are reasonable only to the extent that they are based on a future, or prospective, mix of switching technologies. The Commission's rationale was that these are the costs that would be considered by a company in a competitive market when deciding whether to introduce a new service.[33] The Commission therefore prescribed use of prospective switch investment to set rates.[34] It allowed analog switch investment to be included as part of the carrier's switch technology mix only to the extent those switches will be in service in the future, and required carriers to explain the basis for including that equipment.[35]

15. The cost support in Transmittal No. 446 estimates the expected useful lives of US West's analog equipment, and states that these lives reflect the results of studies sponsored by the United States Telephone Association. US West, however, does not include analog switches in the SCM "core" component. It is therefore unclear whether US West includes analog switches in the mix of switches used to support basic service elements. Accordingly, we direct US West to describe any analog equipment included in its mix of switches used to develop its model for ratemaking purposes. If analog equipment is included, then US West must explain the procedure it used to develop analog unit investment data for basic service elements, and justify its inclusion of analog technology in the forward-looking mix of switch technologies.

**2. Excessive Direct Costs and Overhead Costs.**

16. In the *ONA Final Order*, the Commission found that US West, among other BOCs, had not adequately justified the direct costs and overhead costs on which it based its ONA rates.[36] The Commission therefore required US West to explain how it calculated its direct costs and overhead costs. The Commission also stated that it would resort to calculating an upper limit for these costs based on Automated Reporting Management and Information System (ARMIS) data if US West failed to provide adequate explanations.[37]

17. Rather than develop its own cost support mechanism for "loading" administrative costs onto direct costs associated with basic service elements, US West used the direct costs and overhead loadings from ARMIS that the *ONA Final Order* set forth as the Commission's default approach for ONA. In the *ONA Final Order*, the Commission did not, however, conclude that ARMIS-based direct cost and overhead factors were reasonable in all cases; it found merely that ARMIS figures could be used to establish reasonable upper limits in the absence of reliable carrier-provided data. There is nothing in the *ONA Final Order* that could be read to relieve US West of its obligation to develop adequate cost support. Accordingly, we require US West to either justify in detail its reliance on this approach, or use traditional cost methods to calculate direct costs. We also require US West to provide an explanation for any direct costs that exceed the ARMIS-based upper limit.

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[29] The equations within the SCM model include variables that enable US West to adjust the model to fit assumptions it makes concerning its network. Many of these assumptions are similar to the assumptions one can make using SCIS, such as average investment or marginal investment, cost of money, or switch exhaustion. For a more detailed discussion of these assumptions, see *ONA Investigation Order*, 7 FCC Rcd at 1514-15 (paras. 10-16).

[30] *ONA Investigation Order*, 7 FCC Rcd at 1515 (paras. 17-18).

[31] Open Network Architecture Tariffs of Bell Operating Companies, Order Terminating Investigation, CC Docket No. 92-91, 7 FCC Rcd 2604, 2605 (Com. Car. Bur. 1992) (*ONA Designation Order*).

[32] For example, Pacific Bell claimed that the costs of providing a particular basic service element varied from $15.30 to $4,588.00. *ONA Investigation Order*, 7 FCC Rcd at 1515 (para. 17).

[33] *ONA Final Order*, 9 FCC Rcd at 455 (para. 40).

[34] *Id.* at 456 (para. 41).

[35] *ONA Final Order*, 9 FCC Rcd at 456 (para. 41-43).

[36] *ONA Final Order*, 9 FCC Rcd at 458 (paras. 49-50).

[37] *Id.* at 458 (para. 50). ARMIS is a database containing detailed investment and expense information reported by LECs on a regular basis.

## III. PROCEDURAL MATTERS

### A. Proprietary Materials and Confidentiality Procedures

18. This investigation, like the original ONA investigation, requires the Commission to examine substantial proprietary cost support materials. In the original ONA investigation, the Commission adopted special procedures which were adequate to protect proprietary material without 'unreasonably restricting intervenors' participation.[38] Because in this investigation we must also balance the need to protect proprietary material with the need for intervenors to participate effectively, we adopt similar special procedures here. Specifically, we require that US West designate an independent auditing firm to review these materials, and we require US West to develop a redacted model that intervenors may examine pursuant to a nondisclosure agreement.[39]

19. As in the initial ONA investigation, the auditor will be subject to close supervision by Bureau staff. We direct US West to advise the Commission in writing, no later than ten days from the release date of this Order, of the name of the independent auditing firm it designates. The auditing firm must present, within ten days of its name being submitted to the Commission, a proposal for staff review that includes a schedule for: (1) determining, on an *in camera* basis and subject to supervision by Commission staff, all the ways US West can manipulate the updated SCM software to reflect assumptions US West can make regarding its network, as well as differences between the ONA rates originally submitted by US West and those submitted in Transmittal No. 446; (2) determining whether US West complied with directions in the *ONA Final Order* to correct its ratemaking methodologies; and (3) comparing unit investment figures generated by SCM and SCIS for basic service elements specified by Commission staff.

20. Based on these determinations, the auditing firm should describe in its report the effects on unit investments of changes in assumptions made within the updated SCM model. The report should also describe whether, and to what extent, it relies on the original Arthur Andersen review of the SCM model, and justify that reliance with particularity. US West must also develop and propose procedures for intervenor access to a redacted SCM model, *i.e.*, a version of SCM with proprietary information removed or undisclosed, which can be made available to intervenors pursuant to a nondisclosure agreement. We expect that this redacted SCM will at minimum enable intervenors to examine the effects on SCM outputs of changes in SCM inputs to the same extent as was possible with SCIS Redaction II, used in the first ONA investigation.[40] We also expect that the nondisclosure agreement will be no more restrictive on intervenors than the agreement governing intervenors' examination of SCIS Redaction II.

21. We also require US West to make the justification for tariff rates available to the public to the maximum extent possible. If US West relies on proprietary materials in its direct case, therefore, it should segregate those materials and submit them to the Commission with a request for confidential treatment pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459. US West should justify such requests by giving reasons for confidential treatment as required by the Commission's Rules. To the extent that US West deems it necessary to protect confidential vendor information, it may demonstrate the effect on unit investments of corrections required by the *ONA Final Order* for each switch type US West uses under request for confidential treatment. However, US West should disclose on the public record the weighted average of the effects of these corrections.

### B. Filing Schedules

22. This investigation will be conducted as a notice and comment proceeding. We designate US West as a party to this investigation. To give the independent auditor sufficient time to review US West's response to Issue B, we require US West to file its direct case no later than 120 days after the release date of this Order. In its direct case, US West must respond to all the issues designated above. Moreover, the initial direct case must supply all information upon which US West relies to support its position. We also require US West to make redacted SCM available to intervenors within 120 days of the release date of this Order, and we require the independent auditor to complete its report on its examination of revised SCM by that time.

23. Parties to the original investigation should advise the Commission in writing, no later than two weeks from the release date of this Order, whether they intend to participate in the investigation of Transmittal No. 446. Pleadings

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[38] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 9 FCC Rcd 180, 181 (para. 7) (1993) (*SCIS Disclosure Review Order*).

[39] In the *ONA Final Order*, the Commission stated that carriers should not routinely support proposed rates with proprietary models or data. The Commission also determined that carriers relying on such material "bear a substantial, initial burden of demonstrating the circumstances that preclude reliance on publicly available data." *ONA Final Order*, 4 FCC Rcd at 469 n.163. *See also SCIS Disclosure Review Order*, 9 FCC Rcd at 181 n.17. Similarly, the Bureau has explained that it prefers cost support to be non-proprietary, so that the Commission can benefit from interested parties' knowledge and experience, which might not be available to the Commission otherwise. 800 Data Base Access Tariffs and the 800 Service Management System Tariff, CC Docket No. 93-129, 9 FCC Rcd 715, 718 (para. 11) (Com. Car. Bur. 1994). Nevertheless, as noted above, the Bureau has concluded that any reasonable method of apportioning switching costs for developing ONA rates would require development of an investment cost allocation model based on information proprietary to switch manufacturers. Paragraph 3, *supra*, *citing SCIS In Camera Order*, 7 FCC Rcd at 523-24 (para. 17); *Allnet FOIA Review Order*, 7 FCC Rcd at 6330-31 (paras. 14-17). Furthermore, the Commission in the *ONA Final Order* directed US West to develop revised ONA rates using a single cost model. *ONA Final Order*, 9 FCC Rcd at 463 (para. 63). Under these circumstances, we have determined that US West has adequately justified using a proprietary cost model for the rates subject to this investigation.

[40] The *SCIS Disclosure Order* required BOCs to make a redacted version of SCIS available to intervenors in the first ONA investigation. *SCIS Disclosure Order*, 7 FCC Rcd at 1536 (para. 55). Because some intervenors claimed that the first redacted SCIS model that Bellcore provided was so deeply redacted as to be deficient, the Bureau informally encouraged Bellcore and switch manufacturers to develop a second redacted SCIS model. *See* Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Tariffs, 7 FCC Rcd 5307, 5307 (para. 3); *ONA Final Order*, 9 FCC Rcd at 468 n.149. The Commission referred to this second model as "SCIS Redaction II."

responsive to the initial direct case may be filed no later than 30 days after the direct case is filed, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." Pleadings may be submitted only by intervenors. US West may file a "Rebuttal" to oppositions or comments no later than 15 days after oppositions are filed.

24. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

25. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information is in writing and is placed in the public file or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

**C. Ex Parte Requirements**

26. Ex parte contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, see generally Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. §§ 1.1200 *et seq.*

**D. Paperwork Reduction Act**

27. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

## IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

29. IT IS FURTHER ORDERED that US West Communications, Inc. SHALL BE a party to this proceeding.

30. IT IS FURTHER ORDERED that US West Communications, Inc. SHALL INCLUDE a response to each item of information requested in this Order.

31. IT IS FURTHER ORDERED that this Order shall become effective on the date of its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**Gen. Docket No. 89-97**

In the Matter of

Southern California Public
Safety Plan Amendment

**ORDER**

**Adopted: November 4, 1994; Released: November 4, 1994**

By the Deputy Chief, Land Mobile and Microwave Division:

1. On August 1, 1994, Southern California (Region 5) submitted a proposed amendment to its plan that would revise the current channel allotments. The Commission placed the proposal on Public Notice for comments due on November 4, 1994, 59 FR 50761 (October 5, 1994).

2. On November 3, 1994, State of Nevada (Region 27) filed a request to extend the comment period. Region 27 requested the extension to obtain additional information to conduct a more thorough review of the amendment filed by Region 5.

3. We find that the public interest would be served by granting an extension of the comment period. Accordingly, IT IS ORDERED, pursuant to Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, that the request for extension of time is GRANTED. Comments must be filed by **November 25, 1994** and replies by **December 9, 1994**.

FEDERAL COMMUNICATIONS COMMISSION

Edward R. Jacobs
Deputy Chief, Land Mobile
and Microwave Division

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-162**

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Pacific Bell Transmittal No. 1745
Revisions to Tariff
F.C.C. No. 128

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 3, 1994; Released: November 4, 1994**

By the Acting Chief, Tariff Division:

1. On September 23, 1994, Pacific Bell filed Transmittal No. 1745 to revise its Tariff F.C.C. No. 128. Pacific Bell proposes adding six additional wire centers to the list of wire centers where it will offer expanded interconnection service. Pacific Bell states that the purpose of this filing is to respond to *bona fide* requests from customers for expanded interconnection service in the FRMTCA11, FRMTCA12, HLWDCA01, MLPSCA11, OKLDCA12, and SNLNCA11 central offices, located at Fremont, Hollywood, Milpitas, Oakland and San Leandro, California, respectively. Description and Justification at 1. No petitions were filed against this tariff. Transmittal No. 1745 is scheduled to take effect on November 7, 1994.

2. This transmittal raises the same issues regarding cost allocation, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 1745 is suspended for one day, until November 8, 1994, and will be subject to the investigation initiated in the *Expanded Interconn ection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1745, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 93-162**

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Southern New England Telephone Company
Revisions to Tariff
F.C.C. No. 39

Transmittal No. 625

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 8, 1994; Released: November 9, 1994**

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On September 26, 1994, the Southern New England Telephone Company (SNET) filed Transmittal No. 625 to revise its Tariff F.C.C. No. 39. SNET proposes adding one additional telephone company central office to the list of central offices in which it will offer expanded interconnection service. SNET states that the purpose of this filing is to respond to a *bona fide* request from a customer for expanded interconnection service in the Stamford 02 central office, located at Stamford, Connecticut. Description and Justification at 2. No petitions were filed against this tariff. Transmittal 625 is scheduled to take effect on November 10, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 625 is suspended for one day, until November 11, 1994, and will be subject to the investigation initiated in the *Expanded Interconn ection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to SNET Tariff F.C.C. No. 39, Transmittal No. 625, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that SNET SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. SNET should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), SNET shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

LELAND BROADCASTING GROUP, INC. File No. BPH-890313MP

For Construction Permit
for a New FM Station on Channel 231A
in Leland, North Carolina

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 28, 1994; Released: November 15, 1994**

By the Commission:

1. This *Memorandum Opinion and Order* responds to a *Judgment* of the United States Court of Appeals for the District of Columbia Circuit in *Leland Broadcasting Group, Inc. v. FCC*, No. 92-1444 (November 15, 1993). In the order on appeal in that case, the Commission affirmed the Mass Media Bureau's refusal to reconsider a staff action dismissing the application of Leland Broadcasting Group, Inc. ("Leland") for a new FM broadcast station in Leland, North Carolina. *Leland Broadcasting Group, Inc.*, 7 FCC Rcd 6049 (1992). Leland's application was originally dismissed because it did not comply with the Commission's site map requirements. *WCCR Broadcasting Limited Partnership*, 6 FCC Rcd 2554 (MM Bur. 1991).[1] In dismissing the application, the Commission stated that without the map, "the staff cannot confidently and reliably verify an applicant's site information." *Leland Broadcasting*, 7 FCC Rcd at 6050. The Court remanded the case for an explanation "why the location of Leland's proposed transmitter site could not be verified using the allocation table and aeronautical map included with Leland's application, as discussed in the technical report ... prepared by [Leland's consulting engineer] Raymond E. Rohrer." The technical report did not accompany Leland's application, but was subsequently submitted with Leland's petition for reconsideration and application for review.

2. *Background.* The Commission was faced in 1985 with the influx of thousands of commercial FM applications for 689 FM channel allotments that had been made available by the Commission proceeding in MM Docket No. 80-90. *See Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Assignments*, 94 FCC 2d 152 (1983); *First Report and Order* in MM Docket No. 84-231, 50 Fed. Reg. 3514 (January 25, 1985). Accordingly, it adopted a new processing regime, the "hard look" procedures, intending to expedite the provision of new radio services and to provide certainty and efficiency to its processing of applications. *See Processing of FM and TV Broadcast Applications* (*"FM Processing Order"*), 50 Fed. Reg. 19,936, *affirmed sub nom. Hilding v. FCC*, 835 F. 2d 1435 (9th Cir. 1987).[2] The *FM Processing Order* provided potential applicants with a list of specific items required in order for an application to be considered "substantially complete" and, thus, acceptable for tender. *See* 50 Fed. Reg. at 19,945 (Appendix D). It stated unambiguously that "[i]f any of the ... [specified] information is *missing*, the application will be returned as not sufficient for tender" 50 Fed. Reg. at 19,946 (Appendix D) (emphasis added). This policy was intended to spare the staff from having to write applicants requesting missing information, and it in fact resulted in decreasing significantly the burden imposed on Commission resources by applicants who failed to exercise care in preparing their applications. This, in turn, could permit the allocation of additional staff resources to authorization of service functions and thus benefit the public by speeding the initiation of new service. As the Court recently noted in *Russian River Vintage Broadcasting v. FCC* (*"Russian River"*), 5 F.3d 1518, 1520 (D.C. Cir. 1993), before adoption of the "hard look" rules, the staff found it necessary to return nearly 40 percent of FM applications. In contrast, under the "hard look" regime only approximately five percent had to be returned. *Public Notice Re: Processing of Commercial FM Construction Permit Applications for New Facilities*, 5 FCC Rcd 990 (1990).

3. Among the requirements specified in the *FM Processing Order* was the one involved here, submission of an entire 7.5-minute series U.S. Geological Survey ("USGS") Topographical Quadrangle map containing certain specified information, including "at least two coordinate markings, specifically labelled by the U.S.G.S., one on either side of the marked site." 50 Fed. Reg. at 19,945 (Appendix D, Item 4(b)); FCC Form 301, Section V-B, Item 15; *FM Transmitter Site Map Submissions Required by FCC Forms 301 and 340* (*"Site Map Requirements Order"*), 1 FCC Rcd 381, 382 (1986), summary published, 51 Fed. Reg. 45,945, 45,946 (December 25, 1986).[3] The Commission also permitted two variations of the map requirement.[4] With submission of any of the variations, the

[1] A comparative hearing, action by the Review Board, and approval of a settlement agreement between competing applicants subsequently resulted in issuance of a permit to Hara Broadcasting, Inc.

[2] The Commission recently modified its "hard look" processing rules, effective August 7, 1992. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992). The rule changes apply only to newly filed applications. Accordingly, Leland's application is considered under the rules previously in effect.

[3] The *Site Map Requirements Order* includes as an appendix a *Public Notice*, Mimeo 3693, which was initially released April 5, 1985. That *Notice*, describing the required site map, was referenced in the *FM Processing Order*, 50 Fed. Reg. at 19,945 (Appendix D, Item 4(b)) and was subsequently printed in full in the Federal Register summary of the *Site Map Requirements Order*. *See* 51 Fed. Reg. at 45,945-46.

[4] As one variation, applicants could submit only a portion of a full scale topographic map (or a legible copy thereof), provided that the portion showed "along the printed margin of both axes at least two coordinate markings, specifically labeled by the USGS, one on either side of the marked site." *Site Map Requirements Order*, 51 Fed. Reg. at 45,946. As a second variation, recognizing that it may be inconvenient to provide a full scale photocopy including both the proposed site and the margins, 51

Commission could verify quickly and accurately the coordinates of the applicant's tower site and, in turn, ascertain critical engineering data, such as the ground elevation of the transmitter site and the presence of other nearby communications facilities and/or obstructing terrain. The margins and coordinate markings are the map elements that establish the latitude and longitude of the map segment from which the latitude and longitude of the tower site are determined.

4. Leland, despite the clearly articulated processing guidelines, did not submit a map in any of the three forms the Commission indicated would be acceptable. Specifically, though apparently trying to utilize the alternative which permits an applicant to submit a full scale copy of only that section of the map containing its site, the full scale 7.5-minute section map submitted by Leland lacked fine lines drawn between the cross marks (or tick marks) enclosing the designated site and labeled with appropriate latitude and longitude designations. *See* note 4, *supra*. Leland also failed to submit the requisite accompanying reduced copy of the full scale quadrangle map that permits the staff to verify quickly, by direct observation, that the lines drawn on the full scale section map are correctly labeled, *see id*. Instead, Leland substituted a much less detailed aeronautical map.[5] Thus, in accordance with the plain language of the *FM Processing Order*, the application was returned because Leland omitted required information.

5. In contrast to the situation here, where required information was *omitted*, in cases where the information is *complete* but *inconsistent* or *incorrect*, the Commission will accept the application, if relevant engineering information can be confidently and reliably verified from the application taken as a whole.[6] The Court has asked us to explain why the location of Leland's proposed transmitter site could not be verified confidently and reliably, using the allocation table and aeronautical map, as discussed in Rohrer's technical report, which was submitted after the application was dismissed.

6. *Discussion*. For the reasons stated below, we believe that, although the staff could have eventually confidently and reliably verified the correct coordinates of the transmitter site using the method suggested in Rohrer's report, because such verification would have been difficult, time-consuming, and directly at odds with the fundamental purposes of the "hard-look" procedures, it is not in the public interest to extend the verification exception to this situation. As noted above, pursuant to the "hard look" procedures, applications with visibly *inconsistent* or *incorrect* components are examined to determine if relevant engineering information can be confidently and reliably verified from the application as a whole and, if so, the application is accepted despite the inconsistency or inaccuracy. The Commission reasonably determined that permitting amendments to such applications would balance the need to conserve Commission resources with a desire to be fair to applicants whose filings were substantially complete but contained obvious, minor errors that could readily be corrected.[7] In contrast, as noted *supra*, if an application is *missing* specified information, it is returned. *See* 50 Fed. Reg. at 19,945 (Appendix D) and *Leland Broadcasting*, 7 FCC Rcd at 6050, Paragraph 8. This distinction reflects the Commission's general view that its resources should not be used to, in essence, complete an applicant's filing for him, a process which could potentially involve lengthy delays unfairly affecting other applicants.

7. In our prior order, in explaining why a map is required, we indicated that without a map, "the staff cannot confidently and reliably verify an applicant's site information." *Leland Broadcasting*, 7 FCC Rcd at 6050. Our use of the "confidently and reliably" phrase was not intended to suggest that applicants who fail to submit a map or other required material may avoid dismissal if the necessary information can be confidently and reliably determined from the other information in the application or that we had in fact made a determination that Leland's coordinates could not confidently and reliably be verified from Leland's application taken as a whole. Rather, we were simply saying that the transmitter site map is required under our rules to verify coordinates and avoid dismissal. We recognize that use of the "confidently and reliably" phrase in the *Order* may have been confusing, and we clarify, consistent with the cases cited immediately follow-

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Fed. Reg. at 45,946, the Commission allowed applicants to submit full scale copies of merely the section of the map containing the site, provided that the section included either four of the standard printed cross-marks or one margin and two cross-marks. Applicants opting for this second alternative were required to draw fine lines between the marks to enclose the site, with each line labeled to denote latitude or longitude. They were also required to furnish a reduced copy of the entire quadrangle map so that the staff could confirm that the lines were accurately labeled. *Id*. Every printed feature on the reduced map copy -- each cross mark, road, elevation contour line, text, etc. -- is identical (except for scale) to that on the full-scale map section; one map would essentially be a "thumbprint" of the other. Therefore, the latitude and longitude of the cross marks connected by the fine lines can be verified accurately by direct observation. Parties unable to comply with the map requirements (or any of the Commission's rules) may, for good cause, request a waiver to substitute alternative material. Leland did not request such a waiver.

[5] The topographic map format required by the "hard look" rules is in excess of eight times as detailed as Leland's aeronautical map. Additionally, the aeronautical map does not contain the printed features that the required map provides. *See* note 4, *supra*. The aeronautical map does not have sufficient information on the map itself to allow confirmation, by direct observation, of the latitude and longitude of the coordinate markings on the USGS 7.5-minute map section included with Leland's application.

[6] "If any [specified information] is *present* but ... visibly incorrect or inconsistent," the defect will not render the application not sufficient for tender if the needed information can be derived "confidently and reliably, drawing upon the application as a whole." 50 Fed. Reg. at 19,946 (Appendix D) (emphasis added). Leland's failure to submit a 7.5-minute topographic map rendered the material not "present" for purposes of processing.

[7] The policy was intended to and has permitted the staff to avoid obviously inequitable outcomes without imposing undue burdens on those who process applications. *See, e.g., Donna M. Mavrite*, 6 FCC Rcd 6752 (MMB 1991) (permitting an applicant to amend application where site location gratuitously described in engineering exhibit did not agree with coordinates otherwise specified and plotted consistently throughout the application); *VOB, Incorporated*, 3 FCC Rcd 6750 (MMB 1988) (rejecting petition to deny an application containing a typographical error of channel designation as C2 when only a Class A channel was available).

ing that quoted phrase, that we did not intend to apply or extend the verification exception to applications that do not include required information. *See also Lamoille Broadcasting and Communications General Partnership*, 7 FCC Rcd 2700 (1992); *Apple Communications*, 7 FCC Rcd 1467 (1992). To apply the "confidently and reliably" standard to applications such as Leland's that are missing required information and to thereby accept the application would be, as demonstrated below,[8] inconsistent with the core purpose of the "hard look," *i.e.*, efficiency in processing thousands of FM applications, in order to expedite the provision of new broadcast service to the public.[9] Instead of the required map Leland substituted materials of its own choosing that are a significant departure from standard, readily available materials required of all applicants. Its suggestion that the Commission has an obligation to derive critical information from that material is not reasonable, and, furthermore, as discussed *infra*, would establish a precedent for other parties to disregard the Commission's standardized filing requirements, thus creating grave inefficiencies in processing.

8. The procedure suggested by Rohrer to obtain the information which Leland failed to provide would require the staff to follow no less than six separate steps. Because the USGS 7.5-minute section map and Leland's aeronautical map differ significantly in scale, there is no one-to-one correspondence that enables the staff to move directly from the aeronautical map to the section map. Instead, the staff would be required first to refer to the "Channel 231A Allocation Study" (Annex 7.0) which indicates the distance and bearing from Leland's proposed site to Station WDZD, Shallotte, North Carolina, as well as the WDZD transmitter site coordinates.[10] Next, based on the distance and direction from Shallotte to the WDZD tower, the staff would be required to identify the WDZD tower on the aeronautical map. Notably, the WDZD tower is not marked as such on the aeronautical map. Since all that appears is an unlabeled symbol designating a tower with elevation notations corresponding to the relevant elevations specified in WDZD's authorization, the staff would be required to examine the WDZD license file before it could assume that it has identified the relevant tower symbol as WDZD's. Once WDZD's tower site has been identified on the aeronautical map, the staff would be required to measure eastward in order to ascertain that an unmarked vertical line corresponds to a certain longitude, in this case 78 degrees west. Leland notes that a line depicted towards the bottom on the aeronautical map is designated as 34 degrees north latitude. Next, the staff would be required to utilize the "tick marks" along the 78 degree longitude line and the 34 degree latitude line, proceeding north and west, respectively, at intervals of one second, to determine the relevant 7.5-minute USGS quadrangle map within which the proposed site is situated.[11] Having thus identified the boundaries of the relevant quadrangle from the aeronautical map, the staff could ascertain the coordinates of the tick marks surrounding the proposed site and draw fine lines connecting the tick marks on the 7.5-minute section map. It is only after completing that six-step process that the staff could perform the measurements necessary to verify the site coordinates listed elsewhere in the application.

9. Leland's application, necessitating as it would the expenditure of significant staff time and resources to compensate for applicant omission, exemplifies the exact problem the "hard look" system was designed to avoid. Leland omitted required information and instead substituted materials of its own choice -- an aeronautical map and allocations table. The original application left it to the staff to derive a methodology to verify Leland's coordinates based on these submissions; Rohrer's explanatory report, referenced by the court, was submitted only with Leland's petition for reconsideration. Furthermore, although Leland correctly maintains that its site coordinates can ultimately be derived from the submitted information,[12] such derivation would require the staff both to formulate and utilize a cumbersome, time-consuming, multi-step process. A similar expenditure of time and resources would be required of other applicants for the Leland, North Carolina allotment and otherinterested parties attempting to evaluate Leland's proposal.[13] The convoluted process, by its very nature, is significantly less reliable than contemplated by the Commission when it adopted its "hard look" regime.[14] Further, since Leland's proposed methodology is only one of many methodologies that could conceivably be used to verify coordinates, consideration of Leland's application would be tantamount to inviting all potential applicants to submit their applications without regard for the standard requirements already formally established by the Commission, after notice and comment, regardless of the burden whatever idiosyncratic materials they might choose to submit would impose on the staff and other parties. In contrast, when all required information is included but is merely inaccurate or inconsistent and can be quickly and accurately corrected from the face of the application, no comparable burdens are imposed. *See* para. 6, *supra*.

10. In sum, because Leland omitted the required information which allows the staff to verify both expeditiously and accurately the coordinates of its site, the staff

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[8] *See* paragraph 8 *et seq*. M

[9] *See, e.g., FM Processing Order*, 50 Fed. Reg. at 19,940 "[S]treamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and first come/first serve' process work smoothly and with minimal delay in processing large numbers of applications."

[10] In addition to WDZD, the table lists Stations WZZU, Burlington, and WZKB, Wallace, North Carolina. However, only the WZKB and WDZD towers appear on the aeronautical map. Thus, verification of listed coordinates would likely involve a futile expenditure of resources inquiring into the geographic relationship of the facilities of the other two stations.

[11] Rohrer's report contains some inaccuracies. The report indicates that the tick marks on USGS quadrangle maps are separated by *seven* minutes, thirty seconds. This is incorrect, as the separation is *two* minutes, thirty seconds. The report further indicates that the east set of tick marks on its 7.5-minute site map is determined as 78 degrees, five minutes, *thirty* seconds. In fact, proceeding with the methodology suggested by Leland yields a boundary of 78 degrees, five minutes, *zero* seconds.

[12] We note that, given sufficient time, the staff could eventually have verified Leland's site coordinates without the benefit of Rohrer's directions. Again, however, requiring the staff to do so would be contrary to the purpose of the "hard look."

[13] Each of the other applicants designated for hearing in the Leland proceeding complied with the Commission's requirements for transmitter site maps.

[14] Indeed, Leland's convoluted method arguably does not satisfy the ordinary meaning of "reliable," *i.e.*, it does not lend itself to consistent dependability of results. *See* notes 10 and 11, *supra*.

properly dismissed its application as not sufficiently complete, consistent with the clear mandate of the *FM processing Order*. Even though the staff ultimately could have confidently and reliably determined the coordinates, if, as a matter of policy, it were required to follow such complex multi-step processes as proposed by Leland or as might be submitted by other applications in the future, reliability would be diminished and the processing burden (as well as the burden on competing applicants) would be significantly increased, a result at variance with the core purposes of the *FM Processing Order, i.e.*, the expeditious processing of applications. Thus, we decline to extend our verification exception to applications, such as Leland's, that lack required information. We continue to believe Leland's application was properly dismissed under the "hard look" rules.

11. ACCORDINGLY, IT IS ORDERED, That this *Memorandum Opinion and Order* shall constitute the Commission's explanation in response to the November 15, 1993 *Judgment* of the United States Court of Appeals for the District of Columbia Circuit in the matter of *Leland Broadcasting Group, Inc. v. Federal Communications Commission*, Case No. 92-144.

12. IT IS FURTHER ORDERED, That the General Counsel, on behalf of the Commission, shall file a copy of this *Memorandum Opinion and Order* with the Court.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-259**

In the Matter of

Implementation of the Cable Television Consumer Protection and Competition Act of 1992

Broadcast Signal Carriage Issues

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 28, 1994; Released: November 4, 1994**

By the Commission:

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## I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses issues raised in petitions for reconsideration[1] of our *Report and Order* [2] adopted March 11, 1993, which established rules to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[3] In a *Clarification Order* adopted on May 28, 1993, we addressed specific concerns raised in these petitions relating to signal quality, copyright indemnification and translator ownership.[4] In an *Order* adopted on July 15, 1993, we addressed additional concerns relating to carriage rights, to the failure of broadcast stations to elect either must-carry or retransmission consent status, and to the channel position for such stations.[5] On October 5, 1993, we adopted a *Stay Order* which stayed two provisions of the retransmission consent rules, with respect to VHF/UHF antenna ownership and carriage in the entirety of broadcast signals, pending our resolution of those issues in this proceeding.[6] In this *Memorandum Opinion and Order* we will address all remaining issues raised in the petitions for reconsideration, as well as the outstanding issues from the *Stay Order*. We will also take this opportunity, on our own motion, to clarify certain other issues raised in the *Report and Order*.

2. We note that the constitutionality of the must-carry provisions of the 1992 Cable Act were challenged before the Supreme Court. In *Turner Broadcasting Systems, Inc. v. FCC*, a special three-judge panel of the District Court found the must-carry provisions constitutional.[7] On appeal,

[1] Parties which filed Petitions for Reconsideration, Oppositions, Replies and Comments are listed in Appendix A. Public Notice of Petitions for Reconsideration was given at 58 FR 29582 (May 21, 1993).

[2] *See* Report and Order in MM Docket No. 92-259 ("Report and Order"), 8 FCC Rcd 2965 (1993).

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

[4] *See Clarification Order* in MM Docket No. 92-259, 8 FCC Rcd 4142 (1993) ("Clarification Order"). Translator refers to a television broadcast repeater facility licensed on a secondary basis under Part 74 of the Commission's rules.

[5] *See Order* in MM Docket No. 92-259, 8 FCC Rcd 5083 (1993).

[6] *See Stay Order* in MM Docket 92-259, 9 FCC Rcd 2678 (1993).

[7] *Turner Broadcasting Systems, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993).

the Supreme Court vacated the decision and remanded the case back to the three-judge panel for further proceedings.[8] While the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules.

## II. MUST-CARRY REGULATIONS

### A. Carriage of Local Noncommercial Educational Television Stations.

#### 1. Definition of a Qualified Noncommercial Station.

3. Section 615(l)(1) provides that a local noncommercial educational television ("NCE") station qualifies for must-carry rights if it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, or corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting.[9] An NCE station is also considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.[10] For purposes of must-carry rights, an NCE station is considered local if its community of license is within 50 miles of, or its signal places a Grade B contour over, the principal headend of the cable system.[11] This definition includes the translator of any NCE station with five watts or higher power serving the franchise area, a full-service station or translator licensed to a channel reserved for noncommercial educational use, and such stations and translators operating on channels not so reserved as the Commission determines are qualified NCE stations.[12]

4. The staff has received informal inquiries requesting clarification as to when a translator is "serving the franchise area" of the cable system. Because the service area of a translator differs from that of a full power broadcast station, we believe that guidance should be provided to assist interested parties in determining whether a translator serves the franchise area of the cable system. We believe it appropriate to adopt a standard based on coverage and contour, which has been used in the past and which should be easily identifiable.[13] Therefore, for purposes of a translator serving the cable system's franchise area, the coverage area of such translator shall be its predicted protected contour as specified in Section 74.707 of our rules.

#### 2. Signal Carriage Obligations.

5. In the *Report and Order*, we indicated that Section 615(b) requires cable systems to carry any qualified local NCE television station requesting carriage.[14] Systems with 12 or fewer activated channels must carry the signal of one qualified local NCE station.[15] Systems with 13 to 36 activated channels must carry at least one qualified local NCE station, but need not carry more than three such stations.[16] Cable systems with more than 36 activated channels are generally required to carry all NCE stations requesting carriage.[17] If a system with fewer than 36 activated channels operates beyond the presence of a qualified local NCE station, it is required to import and carry a qualified NCE station.[18] In addition, cable systems must continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990, regardless of the proximity of those stations to the system's principal headend.[19]

6. First, on our own motion, we clarify the carriage requirements of a system with more than 36 activated channels. The 1992 Cable Act states that systems with more than 36 channels must carry the signal of all NCE stations requesting carriage, with one exception: systems with more than 36 channels are not required to carry an additional local NCE station if the programming of such station substantially duplicates the programming of a qualified local NCE station already being carried.[20] It has come to our attention that Section 76.56(a)(1)(iii) of the Commission's rules as adopted in the *Report and Order* has been interpreted by some cable operators to require that only three stations need be carried. However, with respect to systems with more than 36 channels, we clarify that the reference to the number three is a minimum, not a maximum number. A system with more than 36 channels must carry all NCE stations requesting carriage, but is not required to carry more than three NCE stations if the additional station substantially duplicates the signal of NCE stations already carried by the system. Section 76.56(a)(1)(iii) is being revised accordingly.

7. Second, we emphasize that the requirement in Section 615(c) to continue carriage of stations carried as of March 29, 1990 applies only to qualified local NCE television stations and does not apply to a non-local NCE television station which was being imported as of that date.[21] A cable system which was carrying a non-local NCE station in excess of its mandatory carriagerequirements is permitted to drop that station, subject to giving appropriate notice.[22]

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[8] *See Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445 (1994). In remanding the case, the Court determined that issues of material fact must be resolved by the lower court. Specifically, the Court indicated that the government must show that the must-carry provisions are necessary to alleviate the alleged harms and that they do not burden substantially more speech than necessary to further such protection. *Id.* at 2451.

[9] All references to Section 614, Section 615 and Section 325 are references to those sections of the Communications Act of 1934, as amended by the 1992 Cable Act, Sections 4, 5 and 6. *See* 47 U.S.C. §§ 534, 535 and 325.

[10] *See* 47 C.F.R. §76.55(a). In defining a qualified noncommercial educational television station, Section 76.55(a)(2) incorrectly refers to Section 73.612 rather than Section 73.621. We are revising Section 76.55(a)(2) to refer to Section 73.621.

[11] *See* 47 C.F.R. §§76.55(b), 76.5(pp).

[12] 47 C.F.R. §76.55(a)(3).

[13] *See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, MM Docket 90-4 and Carriage of Television Broadcast Signals by Cable Television Systems, MM Docket 84-1296, 6 FCC Rcd 4545 (1991).

[14] *See* 8 FCC Rcd at 2966; *see also* 47 C.F.R. § 76.56.

[15] Section 615(b)(2)(B)(iii) states that a cable system with 12 or fewer usable activated channels shall not be required to remove any programming service provided to subscribers as of March 29, 1990 to satisfy these requirements, however the first available channel must be used to satisfy these requirements. *See* 47 C.F.R. § 76.56(a)(3).

[16] Section 615(b)(3)(i).

[17] Section 615(b)(1).

[18] *See* Section 615(b)(2)(B) and (b)(3)(B); 47 C.F.R. §76.56(a)(2)(i) and (ii).

[19] *See* Section 615(c); 47 C.F.R. § 76.56(a)(5).

[20] Section 615(e).

[21] *See* Section 615(c); 47 C.F.R. § 76.56(a)(5).

[22] *See* 47 C.F.R. § 76.58.

However, if a cable system which would be required to import a NCE signal pursuant to Section 615(b)(3)(B) or (b)(2)(B) was importing a non-local qualified NCE station on March 29, 1990, the system is required to continue carriage of such station. Prior carriage of the non-local NCE station generally indicates that a good quality signal is received at the cable system's headend. In addition, where the cable system voluntarily had been importing such signal prior to March 29, 1990, the continued carriage of such station will not result in additional copyright liability for the cable system. In the event a local NCE station subsequently becomes qualified, the cable operator may drop the distant signal (subject to notification requirements) and substitute the qualified local NCE station. Section 76.56(a)(5) is being revised accordingly.

8. Although the Act generally does not require copyright liability to be paid by a cable operator for the carriage of a local NCE station signal added after March 29, 1990, in the case of importation, the non-local NCE station has neither must-carry nor retransmission rights.[23] We do not believe it appropriate for a non-local NCE station which is being imported to be required to reimburse the cable operator for copyright costs. The 1992 Cable Act specifically provides that a cable system can recover such costs as part of the basic service tier rate, and we believe that this is the appropriate manner for dealing with such costs.[24]

### B. Carriage of Local Commercial Television Stations

#### 1. General Signal Carriage Requirements.

9. *Small System Exception.* Section 614(a) requires carriage of local commercial television stations and qualified low power television stations. Section 614(b) establishes the number of signals which must be carried by cable systems based on their channel capacity. In particular, it provides that a cable system with 12 or fewer usable activated channels must carry the signals of at least three local commercial television stations.[25] Such a system is exempt from any requirements of Section 614, however, if it serves 300 or fewer subscribers, as long as it does not delete from carriage the signal of any broadcast television station.[26] In the *Report and Order*, the Commission concluded that, under this exception, a system must not delete any station it carried on October 5, 1992.[27]

10. Although the language of the text accurately reflects this intention, the Community Antenna Television Association ("CATA") points out that the related rule is misleading because it implies that the system must have had 300 or fewer subscribers as of October 5, 1992.[28] We are revising Section 76.56(b)(1) of our rules to reflect that, at any time that a cable system with 12 or fewer activated channels serves 300 or fewer subscribers, it is exempt from the mandatory carriage requirements under Section 614, as long as it does not delete any signal of a broadcast television station which was carried on that system on October 5, 1992.

11. *Definition of Local Commercial Television Station.* Section 614(h)(1)(A) defines a local commercial television station for the purpose of the must-carry rules as "any full power television broadcast station, other than a qualified noncommercial television station within the meaning of Section 615(l)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system. In the *Report and Order*, we inadvertently defined local commercial television station as "any full power *commercial* television station . . . ", which had the unintended effect of excluding non-qualified noncommercial stations from the definition.[29] A non-qualified NCE station is any NCE station which does not meet the qualification criteria established in Section 615(g). Such a station is not entitled to must-carry rights under that section. Colorado Christian University ("CCU") requests that the text of the rule be revised to conform with the language of the statute.[30] Otherwise, CCU complains, non-qualified NCE stations will not be able to assert must-carry rights in any situation.[31] San Jacinto Television Corporation, licensee of station KTFH(TV) ("San Jacinto"), and the Association of Independent Television Stations ("INTV") oppose this request, arguing that a non-qualified NCE station should not be granted carriage rights.[32] We believe that the definition of local commercial television station contained in the 1992 Cable Act clearly includes non-qualified NCE stations; the definition includes all stations other than "qualified NCE stations." Consistent with the language of the 1992 Cable Act, we determine that NCE stations which are not "qualified" NCE stations for must-carry purposes may assert must-carry rights under Section 614 within their local market, just like any other broadcast station.[33]

12. *Availability and Identification of Must-Carry Signals.* Section 614(b)(7) provides that all must-carry signals shall be provided to every subscriber of a cable system and shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which the cable operator provides a connection. In the *Report and Order* we declined to grant a request to provide a special exception for commercial subscribers (*e.g.*, hotels, hospitals) that receive specially designed channel line-ups.[34] We stated our belief that the 1992 Cable Act is clear in its application of Section 614(b)(7) to every subscriber of a cable system, that it grants no authority to exempt a specific class of cable subscribers from the carriage requirements, and that there is no reason to believe that such commercial subscribers are not interested in receiving local broadcast signals.[35]

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[23] Section 325(b)(2)(A) specifically excludes noncommercial broadcast stations, and 47 C.F.R. Section 76.64(a) refers only to commercial broadcast stations.
[24] Section 623(b)(2)(C)(ii).
[25] Section 614(b)(1)(A).
[26] 8 FCC Rcd at 2973.
[27] *Id.*
[28] CATA Petition at 2.
[29] 8 FCC Rcd at 2973.
[30] CCU Petition at 2-3.
[31] *Id.*
[32] San Jacinto Opposition at 2-3; INTV Reply at 8.
[33] We interpret local commercial television station to include stations operating under a valid construction permit.
[34] 8 FCC Rcd at 2974.
[35] *Id.*

13. The National Cable Television Association ("NCTA") and Time Warner Entertainment Company, L.P. ("Time Warner") request that we reconsider the requirement to make all must-carry signals available to all subscribers including commercial subscribers (hotels/hospitals) which have contracted for a special channel 8line-up.[36] NCTA points to a footnote in the text of the *Report and Order* which stated that "commercial subscribers, of course, may exclude the must-carry signals in cases where converters or other equipment are needed to receive such signals, the subscriber elects not to obtain such equipment, and the cable operator does not provide the connections for all television receivers in the commercial establishment."[37] NCTA requests that we expand this caveat to state that the cable operator may provide all of the wiring to individual rooms and yet not requirex its customer to provide connections for all television sets in the commercial establishment.[38] These parties argue that "sophisticated buyers of video programming" should not be forced to buy what they do not want.[39]

14. In opposition, the National Association of Broadcasters ("NAB") argues that there is no basis for distinguishing between residential and commercial subscribers, and that Section 614(b)(7) provides no basis for allowing cable operators to delete must-carry signals from the commercial subscriber channel line-up.[40] NAB points out that the issue is not the level of sophistication of commercial entities requesting service, but rather the access to local stations by the viewers in these establishments.[41]

15. We agree with NAB that the must-carry provisions do not distinguish between commercial and residential viewers. Congress made clear its intent that all subscribers have access to local commercial broadcast signals. We do not believe that NCTA or Time Warner has presented sufficient cause to change our earlier interpretation of the 1992 Cable Act. Therefore, we affirm that all subscribers must have access to these signals on all television sets connected by the cable operator or for which the cable operator provides a connection.

16. It is our understanding that the on-channel carriage of some UHF signals has resulted in situations where a converter box supplied by a cable operator does not contain the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter. For example, a converter may supply channels 2-36 while the must-carry station is on channel 55. Where a cable operator chooses to provide subscribers with signals of must-carry stations through the use of converter boxes supplied by the cable operator, the converter boxes must be capable of passing through all of the signals entitled to carriage on the basic service tier of the cable system, not just some of them. In addition, any converter boxes provided for this purpose must be provided at rates in accordance with Section 623(b)(3). Therefore, in a situation where the subscriber's converter is supplied by the cable operator, and is incapable of receiving all signals as required by Section 614(b)(7), the cable operator must make provision for a converter which is capable of (providing these signals.)[42] If it is necessary to replace the converter, the subscriber must not be required to pay additional sums nor to pay for the installation.[43] As discussed below,[44] we have provided a mechanism for relief for cable systems which cannot meet the on-channel requests of must-carry stations. A decision not to seek such relief may not be used to contravene the directives of the 1992 Cable Act.

**2. Definition of a Television Market**

17. Use of ADI Markets and the Home County Exception. Under the 1992 Cable Act, a local commercial television station is entitled to must-carry status on all cable systems located in the same television market as the cable system.[45] The 1992 Cable Act states that the television market shall be determined pursuant to Section 73.3555(d)(3)(i) of our rules, which in turn defines a television market in terms of the Area of Dominant Influence ("ADI"), as defined by Arbitron.[46] In the *Report and Order*, the Commission noted that each county in the contiguous United States-is assigned by Arbitron exclusively to one ADI, and that each broadcast station licensed to a community located in an ADI is considered local throughout that ADI.[47] The Commission established one exception to that rule, determining that each broadcast station will also be considered a must-carry station in its home county, even if that station is assigned to a different ADI from that of its home county (the "home county exception").[48]

18. Cypress Broadcasting, Inc. ("Cypress"), the licensee of television station KCBA(TV), Salinas, California, filed a petition seeking reconsideration of the home county exception because it accords television station KNTV(TV), licensed to San Jose, California, and similarly situated stations, must-carry rights in an entire county outside their Arbitron designated ADI. Cypress argues that the Commission failed to give adequate notice that it might adopt this

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36 NCTA Petition at 15-16; Time Warner Reply at 2-3.

37 NCTA Petition at 15-16 (citing 8 FCC Rcd at 2974 n.99).

38 *Id.*

39 *Id.*; Time Warner Reply at 3.

40 NAB Opposition at 9-10.

41 *Id.*

42 *See Memorandum Opinion and Order* (CSR-3903-M) (Complaint of WLIG-TV, Inc. against Cablevision Systems Corporation), DA-93-1365 (released November 10, 1993), in which the Mass Media Bureau noted that converter boxes provided by the cable system must be capable of transmitting all the signals entitled to mandatory carriage on the basic tier, and required Cablevision, because it was in the midst of an upgrade of its system, to switch station WLIG to a channel receivable by all subscribers, without the necessity of an additional converter box, during the rebuilding of its system.

43 We note that where the cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator must notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and the operator must offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3). *See* Section 614(b)(7).

44 *See infra* at para. 57.

45 Section 614(h)(1)(A) and (C).

46 *See* Section 614(h)(1)(C); *see also* 8 FCC Rcd at 2975 n.100. We note that Arbitron has cancelled its television ratings service. However, the decision will not have an impact on the use of Arbitron-designated ADIs until the next must-carry/retransmission consent election which must take place by October 1, 1996. *See* 47 C.F.R. § 76.55(e); 47 C.F.R. § 76.64(f)(2). We will address this issue sufficiently before that date.

47 8 FCC Rcd at 2975.

48 *Id.*

exception to the must-carry rule.[49] According to Cypress, nowhere in the *Notice of Proposed Rule Making*[50] did the Commission suggest that it would allow the automatic addition of counties to the market of some stations.[51]

19. This petition is opposed by Granite Broadcasting Corporation ("Granite"), licensee of KNTV.[52] Granite maintains that the Commission gave adequate notice that it was considering adjustments or modifications of television markets, and sought comment on how to address requests for modification, including those not covered by the 1992 Cable Act.[53] Granite contends that the home county exception is a logical outgrowth of the Commission's rule making proposal that should have been anticipated by Cypress.[54]

20. Cypress disagrees that the home county exception is a logical outgrowth of the matters addressed in the *Notice*. It states that the Commission acknowledged in the *Notice* that, pursuant to Section 614(h)(1)(c), "it could only add 'communities' to a station's television market and that it would do so only after a written request in accordance with the procedures to be adopted in the *Notice*."[55] Thus, Cypress concludes that there was no basis for it to anticipate a home county exception, a rule it argues is inconsistent with the 1992 Cable Act.[56]

21. The *Administrative Procedure Act ("APA")*[57] requires an agency, when issuing a general notice of proposed rule making, to provide the public with "either the terms or the substance of a proposed rule or a description of the subject and issues involved."[58] The APA, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule."[59]

22. The *Notice* set forth the 1992 Cable Act's direction that such markets would be determined primarily in the manner provided in Section 73.3555(d)(3)(i) of the Commission's rules, (which section uses Arbitron-defined ADIs), and specifically sought comment from the public concerning the Congressionally recognized need for adjustments to or modifications of television markets.[60] The Commission specifically stated that "it may determine that particular communities are part of more than one television market," and further explained that it would act upon written requests to add or delete communities to a station's market "to better reflect market realities and effectuate the purposes of this Act."[61] We believe that it was apparent that the Commission was likely to receive comments and suggestions regarding methods to assure that television stations' must-carry markets, both generally and in individual cases, best reflect market realities and the objective of localism underlying broadcast signal carriage obligations. While the *Notice* did not specifically seek comment on the home county exception, we believe that the home county exception is a "logical outgrowth" of the *Notice*.[62] Accordingly, we are not persuaded by Cypress' arguments that the *Notice* did not give adequate notice in compliance with the requirements of the APA.

23. Cypress also asserts that the Commission's adoption of the home county exception is in direct violation of the 1992 Cable Act in that it assigns must-carry rights outside of a station's ADI on a county-wide basis rather than by community as provided by Section 614(h)(1)(C)(i).[63] It argues that, under the clear language of that statutory provision, a station's must-carry market is defined by its Arbitron ADI, with no must-carry rights for the station beyond that ADI.[64] Cypress argues that the 1992 Cable Act establishes a specific procedure for affording a station must-carry rights in communities outside of its ADI, and spells out the precise matters the Commission must consider in ruling on individual written requests, referencing the provision of the 1992 Cable Act that provides:

> [F]ollowing a written request, the Commission may, *with respect to a particular broadcast station*, include *additional communities* within its television market to better effectuate the purposes of this section. In con-

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[49] Cypress Reply at 6-9.

[50] *Notice of Proposed Rule Making* in MM Docket No. 92-259 ("Notice"), 7 FCC Rcd 8055 (1992).

[51] *Id.*

[52] KNTV(TV), Channel 11 (ABC), is licensed to San Jose, California. San Jose is part of the San Francisco-Oakland-San Jose Arbitron ADI. However, the city of San Jose is located within Santa Clara County, a county included by Arbitron in the Salinas-Monterey ADI. In comments filed in response to the *Notice* in this proceeding, Granite stated that although KNTV is listed by Arbitron in the Salinas-Monterey ADI, it and similarly situated stations should be deemed "local" for must-carry purposes in their home county when such county lies outside the ADI in which the station is assigned. Granite Opposition at 16-17. In adopting the home county exception, the Commission noted the case of KNTV. 8 FCC Rcd at 2975 n.108.

[53] Granite Opposition at 13-16.

[54] *Id.*

[55] Cypress Reply at 8.

[56] Cypress claims that it should not be deemed to have been put on notice that Granite made a home county exception proposal because Granite did not serve Cypress with a copy of its comments. Cypress Reply at 9. We reject Cypress' suggestion that either the Commission or Granite was obligated to serve it with a copy of Granite's comments submitted in response to the *Notice*. Neither the APA nor the Commission's rules of procedure require personal service to specific parties of general rule making comments. Sufficient notice to parties is presumed when the *Notice* is published in the Federal Register, and parties have an obligation to follow proceedings in which they may be interested. *See* 47 C.F.R. § 1.412. Moreover, the law does not require a new notice whenever an agency responsibly adopts the suggestions of interested parties. *See, e.g., Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (DC Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

[57] 5 U.S.C. Section 551 *et seq.*

[58] *See* 5 U.S.C. § 553(b)(3).

[59] *California Citizens Band Association v. United States*, 375 F.2d 43, 48 (9th Cir. 1967); see also Spartan Radiocasting Co. v. FCC, 619 F.2d 314 (4th Cir. 1980). The notice is sufficient if the final rule is a "logical outgrowth" of the rule proposed. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980).

[60] Section 614(h)(1)(C)(i) states that a broadcasting station's market shall be determined in the manner provided in section 73.3555(d)(3)(i) of the Commission's rules, except that the Commission may include or exclude additional communities to better effectuate the purposes of Section 614. 47 U.S.C. § 534(h)(1)(C)(i).

[61] *See* Section 614(h)(1)(C); *see also* 7 FCC Rcd at 8059.

[62] *See, e.g., United Steelworkers*, 647 F.2d at 1221; *Health Insurance Association of America, Inc. v. Shalala*, 23 F.3d 412, 421 (1994); *Northwest Tissue Center v. Shalala*, 1 F.3d 522, 528 (1993).

[63] Cypress Petition at 7-9; Cypress Reply at 2-4.

[64] *Id.*

sidering such requests, the Commission may determine that particular *communities* are part of more than one television market.[65]

Cypress argues that the Commission received no written request from Granite which complied with the evidentiary requirements established by Section 614(h)(1)(C)(ii), and therefore had no record to support the statutorily required finding to afford this relief to KNTV.[66]

24. In opposition, Granite states that nothing in the 1992 Cable Act precludes adding a county to a station's market and notes that the Commission adopted the home county exception as a rule of general applicability for all stations whose home county lies outside its ADI.[67] It maintains that Section 614(h)(1)(C)(i) directs that market adjustments be limited to particular television stations, while the home county exception is entirely separate from a request to modify an individual television station's market.[68] It contends that the addition of Santa Clara County to KNTV's market was appropriate in the rulemaking proceeding, as opposed to an individual adjudicatory proceeding, "because every similarly situated station -- that is, every station whose home county lies outside its ADI -- should have its market defined to include its home county."[69] It asserts that in order to serve the 1992 Cable Act's goal of promoting localism, the home county of every station should be included in its must-carry market through the adoption of a general rule, rather than on an *ad hoc* basis.[70] Further, Granite maintains that the Commission is not precluded from exercising its own rulemaking authority to adopt such an exception.[71] Granite also notes that even under Cypress' reading, there is nothing in the 1992 Cable Act to prohibit the Commission from adding all the communities of a county to a must-carry market.[72] Thus, it argues, there is no basis to construe the 1992 Cable Act as preventing the addition of a county to a must-carry market.[73]

25. We disagree with Cypress that the home county exception violates either the spirit or letter of the 1992 Cable Act. Specifically, we disagree with the proposition that although a television station's must-carry rights are defined primarily by Arbitron ADIs, there can be no must-carry rights beyond the ADI to which a station is assigned by Arbitron. Section 614(h)(1)(C)(i) recognizes a potential, but easily corrected, deficiency in the use of Arbitron ADIs to define a station's must-carry market. We find no basis to presume that the Commission may not adjust ADIs generally to ensure that stations have must-carry rights in those areas where their service isappropriately "local." We agree with Granite that adoption of the home county exception is separate and apart from the procedure established to make individual station market adjustments based on particular situations.

26. *Modification of ADI Markets.* As noted in the *Report and Order*, the 1992 Cable Act permits the Commission to add or subtract communities from a television station's market to better reflect marketplace conditions or to promote the goal of localism underlying the signal carriage provisions.[74] In its petition, INTV requests that the Commission add or subtract a community for all stations in the market, not for an individual station. INTV suggests that upon the addition of a community to a market, every station in the community would attain must-carry rights in that market.[75]

27. The Commission has already addressed this subject in the *Report and Order* in response to parties' contentions that ADI modifications should be made on a community, rather than on a station, basis. Both the 1992 Cable Act and our rules require, for each broadcast station, an evidentiary showing from an interested party, with opportunity for comment. INTV's request would not meet this requirement and therefore must be rejected. We reiterate our statement in the *Report and Order* that we will accept joint filings by a group of stations or a single request from a cable operator for changes for more than one station licensed to the same community, so long as the submitted information demonstrates that each station is entitled to have its market modified.[76] The special relief procedures will ensure that the 1992 Cable Act's objectives of promoting localism and reflecting market realities are achieved.[77]

28. As noted above, Section 614(h)(1)(C) directs the Commission, when considering ADI modification requests, to promote localism by taking into account the four factors

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[65] Section 614(h)(1)(C)(i); 47 U.S.C. § 534(h)(1)(C)(i) (emphasis added by Cypress).

[66] Section 614(h)(1)(C)(ii) directs that in considering requests to add or exclude certain communities within a television station's market pursuant to this section, the Commission shall afford particular attention to the value of localism by taking into account such factors as: the historical cable carriage of the station on cable systems in the subject community; whether the station provides coverage or local service to the community; whether other must-carry stations in the community provide news coverage of issues of concern to such community, or provide carriage or coverage of sporting or other events of interest to the community; and evidence of viewing patterns in cable and noncable households within the areas served by the cable system in the community. In the *Report and Order*, the Commission determined to use the special relief procedures to modify television markets, pursuant to a modified Section 76.7 of our rules. Moreover, the Commission determined not to restrict the types of evidence that parties may submit to demonstrate the propriety of changing a station's must-carry market, or to prejudge the importance of any of the factors set forth in the statute because each case will be unique. *See* 8 FCC Rcd at 2977.

[67] Granite Opposition at 6-7 n.9.

[68] Granite notes that in the *Report and Order*, the Commission addressed the home county exception in the context of the general definition of local television market, whereas the addition or deletion of specific communities in a market is addressed as a form of relief intended by the 1992 Cable Act to address the "individual situation" of a particular television station. *Id.* at n.8.

[69] *Id.* at 8. Granite further states that Cypress' contention that the statutory requirements of Section 614(h)(1)(C)(ii) of the 1992 Cable Act have not been met with respect to KNTV is "entirely misplaced," because adoption of the home county exception is not a modification of one must-carry market granted pursuant to a written request under that section. *Id.* at 7.

[70] *Id.* at 8.

[71] *Id.*

[72] *Id.* at 11-12.

[73] *Id.*

[74] 8 FCC Rcd at 2976.

[75] INTV Petition at 7.

[76] 8 FCC Rcd at 2977 n.139.

[77] *Id.* The same logic applies to a single station requesting the addition of multiple communities.

listed in that section.[78] Press Broadcasting Company, Inc. ("Press"), the licensee of WKCF(TV), Clermont, Florida, seeks clarification or partial reconsideration of the types of evidence the Commission has indicated that it will consider in assessing proposed changes in a station's must-carry market.[79] Specifically, Press states that, among other things, the Commission observed in the *Report and Order* that to show that a station provides coverage or other local service to the cable community, "parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage."[80] Press maintains, however, that mere geographic proximity is not, in and of itself, meaningful evidence of coverage or service. It asserts that the Commission is not sufficiently clear whether such proximity refers to the distance between the cable community, and, for example, a station's city of license, transmitter or some other aspect of a station's operation. In any event, it suggests that before a station's must-carry status is altered, the Commission should be satisfied that the station's signal is available throughout all or most of the subject cable market.[81] Further, Press suggests that the Commission should consider whether the station can demonstrate that it has chosen to include itself in the market by, for example, voluntarily agreeing to pay programming costs based on market-wide prices.[82]

29. We clarify that the two factors mentioned in the *Report and Order* are merely examples of the types of evidence that might be considered in a request to modify an ADI. The Commission purposely did not restrict the types of evidence that may be used to demonstrate that a station's must-carry market should be modified.[83] The Commission declined to prejudge the importance of any of the factors set forth in the statute, noting that each case will be unique.[84] Accordingly, we note that the factors suggested by Press may be employed by parties to show the appropriateness of altering a station's must-carry market, although the importance of such factors may differ from one situation to the next.[85]

30. *Section 76.51 Top 100 Market List.* Section 614(f) of the 1992 Cable Act directs the Commission to issue regulations that include revisions needed to update the list of top 100 television markets and their designated communities contained in Section 76.51.[86] Although the *Notice* sought guidance on how to fulfill this requirement,[87] the comments were general in nature and did not offer a mechanism for revising the top 100 market list, including criteria for determining when a city of license should become a designated community in a television market.[88] Accordingly, the Commission concluded in the *Report and Order* that a wholesale revision of Section 76.51 was unnecessary and stated that it would only update the existing list by adding those designated communities requested by parties providing specific evidence that a particular market change is warranted.[89] The Commission made three specific market modifications, and stated that further revisions to this list would be made on a case-by-case basis.[90] The Commission stated that requests for modification should demonstrate "commonality" between the proposed community to be added to a market designation and the market as a whole, and that such requests would be made in accordance with the factors in Section 614(h)(1)(C) and the related rules.[91]

31. A number of broadcast television licensees in Columbus, Ohio filed petitions for reconsideration respecting the addition of Chillicothe to the Columbus, Ohio television market.[92] These petitioners allege that the Commission's action was taken without sufficient notice to interested parties and was therefore based on an inadequate factual record. They maintain that the *Notice* in this proceeding generally requested comment on suitable\criteria for revising Section 76.51 of the rules pursuant to Section 614(f), and indicated that, during the pendency of the rulemaking, market revisions would be made on an *ad hoc* basis through individual rulemaking notices. These petitioners contend that, despite the language of the *Notice*, only the modification of the Atlanta, Georgia television market was the subject of a prior notice of proposed rulemaking, and even in modifying that market, the Commission declined another request to include Athens, Georgia in the market because that proposal was not included in the prior notice.[93] By contrast, they assert, the addition of Chillicothe

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78 Section 614(h)(1)(C)(ii); Section 614(h)(1)(C)(ii) (II).

79 Press Petition at 2-4.

80 *Id.* at 2 (citing 8 FCC Rcd at 2977).

81 *Id.* at 2-4.

82 *Id.* at 4-5.

83 *Id.* This is consistent with the legislative history of this section of the 1992 Cable Act which states that the particular factors set forth in the statute "are not intended to be exclusive." House Committee on Energy and Commerce, H.R. Rep. No. 628 ("House Report"), 102d Cong., 2nd Sess. (1992) at 97.

84 8 FCC Rcd at 2977.

85 We note that, in stating that a station may demonstrate that it is located close to the community in terms of mileage, a station may present evidence, as suggested by Press, regarding the distance between the cable community and the station's community of license, transmitter, or other aspect of the station's operation.

86 47 C.F.R. § 76.51.

87 7 FCC Rcd at 8060.

88 8 FCC Rcd at 2977.

89 *Id.* at 2978.

90 The Commission made the following market modifications: (1) added Chillicothe to the Columbus, Ohio market; (2) added New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut market; and (3) added Rome to the Atlanta, Georgia market. *Id.*

91 *Id.; see also* Section 614(h)(1)(C); 47 C.F.R. § 534(h)(1)(C). The Commission also stated that the same procedures would be applicable to requests to delete named communities from specific hyphenated markets.

92 Petitions were filed by: Anchor Media, Ltd. (WSYX(TV)), WBNS TV Inc. (WBNS-TV), Outlet Broadcasting, Inc. (WCMH-TV), and WTTE, Channel 28 Licensee, Inc. (WTTE(TV)).

93 In its petition, Outlet Broadcasting, Inc. notes that Triplett and Associates, Debtor-in-Possession ("Triplett"), licensee of WWAT(TV), Chillicothe, and proponent of the subject rule amendment, filed comments in this proceeding merely incorporating by reference two earlier requests for modification of the market. Outlet maintains that the Commission never issued a public notice concerning the earlier proposals. Moreover, it claims that the Commission only reported the filing of Triplett's submission in this proceeding in a notice of comments received in this docket, listing Triplett as one of many filers and giving no indication of the nature of those comments. As a result, Outlet states, "the Commission understandably received no oppositions or comments on the idea." Outlet Petition at 6-7.

was made without any published notice or an independent notice of proposed rule making consistent with the procedures announced in the *Report and Order*, or any other indication from the Commission that it was contemplating the change, and without interested parties receiving service of the proposal.

32. As noted above, the APA requires an agency, when issuing a general notice of proposed rule making, to provide the public with "either the terms or the substance of a proposed rule or a description of the subject and issues involved," but "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule."[94] In the *Notice*, the Commission specifically requested that interested parties "comment on what modifications to the television markets specified in Section 76.51 of our rules is needed to ensure that it reflects current market realities."[95] In so doing, the Commission observed that this proceeding necessarily overlaps with an ongoing proceeding involving, *inter alia*, the makeup of the Section 76.51 market list in relation to the Commission's program exclusivity rules.[96] Therefore, the Commissionp explicitly stated that Docket 87-24 would be reopened for further comment in the context of this rulemaking in order to facilitate coordination of the overlapping aspects of the two proceedings.[97]

33. In light of the nature of this proceeding, the statutory instruction to amend, as necessary, Section 76.51, and the incorporation by reference of the issues in Docket 87-24, we conclude that the *Notice* amply alerted the public that potential amendments to that rule section could be made in the context of this specific proceeding.[98] The Commission explicitly soughtbpublic comment on what modifications to Section 76.51 would be necessary to fulfill the directive of Section 614(f), and we believe that specific market change proposals are a natural and logical outgrowth of the range of issues presented in the *Notice* and discussed in the comments filed in this proceeding. Accordingly, we are not persuaded by the petitioners that the *Notice* did not provide adequate notice to interested parties that specific amendments to Section 76.51 were likely to be considered in this proceeding.

34. We disagree with the petitioners' contentions that amendment of the Columbus market first required the issuance of an independent notice of proposed rulemaking. The fact that we said in the *Notice* that we may consider further revisions to Section 76.51 on an *ad hoc* basis did not preclude the Commission's taking specific action on particular modifications consistent with the guidance provided by the 1992 Cable Act where the record indicated that such changes were warranted.[99]

**3. Selection of Signals.**

35. *Definition of Substantial Duplication*. Section 614 (b)(5) provides that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast net-

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[94] *See* discussion *supra* paras. 21-22.

[95] 7 FCC Rcd at 8060.

[96] *See Further Notice of Proposed Rule Making* in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). Further, the pendency of Triplett's request to modify the Columbus, Ohio television market is referenced in Docket No. 87-24, 3 FCC 2d at 6176 n.15, which was incorporated into the instant proceeding.

[97] *See* 3 FCC 2d at 6171 (1988). In response to the *Notice* in this proceeding, the proponents of three previously-filed market change petitions for rulemaking filed comments which incorporated by reference their rulemaking petitions and urged the adoption of their Section 76.51 market amendment proposals. One of these proponents, Star Cable Associates ("Star"), operator of a cable television system serving the community of Brazoria, Texas, and portions of Brazoria County, Texas, filed a petition for reconsideration based on the concept that although the Commission granted other requests to modify existing television markets, the Commission did not act on Star's request to amend Section 76.51 to add the community of Alvin to the Houston, Texas market. Star states that it has had such a request pending before the Commission since January 1991. Star's comments to the *Notice* in this proceeding were incorporated into and filed with Adelphia, *et al.* and included numerous other cable operators. These parties were arguing that the Commission need not revise the Section 76.51 market list, stating that "[n]o revision to this list is needed to implement the must-carry rules since the current ADI markets are to be used for determining must-carry rights." Adelphia comments to *Notice* at 11-12. It was suggested in those comments that the Commission "might wish to update the list . . . to add new communities to existing markets for stations which have gone on the air since the list was last revised" and, in that context noted the copyright consequences explained in the pending petition regarding the Houston market. *Id.* However, neither Adelphia nor Star specifically requested action in the must-carry context on Star's pending petition for rulemaking. Under these circumstances, we do not believe that it was erroneous to defer action on the Star petition.

[98] Neither the APA nor the Commission's rules specifically required that the petitioners receive personal service of the particular market change proposals tendered in comments filed in this proceeding. *See supra* note 55. Moreover, we observe that at least one petitioner, Outlet, notes that the filing of Triplett's submission was referenced in a public notice of comments received in this docket. *See* FCC Filings, Mimeo No. 31317, released January 15, 1993. However, we do not agree that the Commission was somehow obligated to indicate the nature of Triplett's comments, and the petitioners offer no support for that particular proposition. To the extent that Triplett incorporated by reference its previous request regarding Chillicothe, which was also noted in Docket 87-24, we do not believe that obviated the responsibility of interested parties to assess the nature of comments received in response to the general rulemaking issues specifically raised in the *Notice*.

[99] *See Edison Electric Institute v. OSHA*, 849 F.2d 611 (D.C. Cir. 1989). We do not agree that the action taken with respect to a proposal to include Athens in the Atlanta market indicates that the Commission could only act in independent and separate rulemaking proceedings. The Georgia Public Television Commission ("GPTC"), licensee of noncommercial educational television station WGTV(TV), Athens, Georgia, sought to include Athens as a designated community in the Atlanta market essentially to increase the station's visibility and fund raising in the market. GPTC's proposal was not submitted in the instant proceeding directly or incorporated by reference, but rather in comments supporting the requested action in MM Docket 92-295, which specifically addressed the Rome proposal. Parties commenting in MM Docket 92-295 had no opportunity to comment upon the Athens proposal in the context of that proceeding. Moreover, GPTC's proposal differs significantly from the competition and carriage issues vis-a-vis commercial stations raised in either the instant proceeding or in MM Docket 92-295 (relating specifically to Rome). In light of the action taken in the *Report and Order*, the Commission appropriately terminated MM Docket 92-295, and invited GPTC to refile its proposal for consideration in an independent proceeding.

work.[100] In the *Report and Order*, based on the legislative history of this section of the 1992 Cable Act, we decided that two stations "substantially duplicate" each other "if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week."[101] For purposes of this definition, identical programming means the identical episode of the same program series.[102]

36. NCTA requests that this definition be modified to conform to the definition of duplication in the syndicated exclusivity and network nonduplication rules.[103] It states that the Commission is not compelled to follow the legislative history because Congress left the definition of substantial duplication to the Commission's discretion, rather than including it in the 1992 Cable Act. NCTA asserts that Congress intended to relieve cable operators of the need to devote channel capacity to duplicative programming at the expense of programming that provides diversity to viewers.[104] It further contends that the Commission's definition will only be met in situations where one station is a satellite of the other.[105] In addition, NCTA argues thatPrequiring carriage of a station that can be blacked out pursuant to the exclusivity rules for a substantial portion of the broadcast day deprives the cable operator of discretion not to carry substantially duplicative stations and cannot be what Congress intended.[106]

37. In opposition, NAB notes that under NCTA's proposal, the existence of two stations in separate markets that have exclusivity rights to one program would be sufficient to relieve the operator of carriage obligations, contrary to Congressional intent.[107] It also states that there is no relation between carriage rights and the protection afforded to local stations under the program exclusivity rules, which were designed to level the competitive playing field and permit stations to enforce contractual rights.[108] NAB asserts that Congress did not equate substantial duplication in the must-carry context with the duplication policies under the exclusivity rules. It further claims that Congress did not intend for exclusivity rights to affect either the carriage of stations asserting such rights or the carriage of stations against which these rights are asserted, yet NCTA's proposal appears to permit cable operators to decline carriage of any station against which exclusivity rights are applied.[109] In response to NCTA's contention that cable operators will have to carry duplicative stations and then delete the duplicating programming, NAB points out that cable operators can combine a station's programming not subject to deletion with substitute nonduplicative programming to provide diverse programming consistent with the intent of the 1992 Cable Act.[110]

38. We continue to believe that our definition of substantial duplication is appropriate for determining signal carriage obligations. We note that it is consistent with the legislative history that indicates that this term refers to the "simultaneous transmission of identical programming on two stations" and which "constitutes a majority of the programming on each station."[111] While we agree with NCTA that Congress gave the Commission discretion to define substantial duplication, we continue to believe that the most appropriate approach here is to act consistently with the legislative history. Congress did not intend for a single duplicative program, whether subject to blackout or not, to be the determining factor. Finally, we observe that our rules often use different definitions for similar terms based on the purpose of the policy involved.[112] The Commission's exclusivity rules are intended to protect the rights that a broadcaster has bargained for with the supplier of a particular program. The must-carry rules, however, are intended to ensure that local stations are available to cable subscribers. Thus, we reject the proposed modification to our definition of substantial duplication.

**4. Low Power Television Stations.**

39. *Qualified Low Power Television Station.* Section 614(h)(2) contains the statutory requirements a low power television station (LPTV) must meet before it will be considered "qualified" for must-carry purposes.[113] As we stated in the *Report and Order*, a low power television station must meet all of the statutory requirements to be "qualified" for must-carry status.[114] Cable systems are required to carry a qualified LPTV station only if there are not suffi-

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[100] 47 U.S.C. § 534(b)(5); 47 C.F.R. § 76.56(b)(5). Western Broadcasting Corporation of Puerto Rico, licensee of Station WOLE, Aguadilla, requests that the Commission reconsider its rules with respect to their application to WOLE, "given the unique situation in Puerto Rico." Western Broadcasting Petition at 1-3. We note that such a request is more appropriately made as a petition for special relief rather than as part of a general rulemaking proceeding.

[101] 8 FCC Rcd at 2980-2981 (citing House Report at 94).

[102] We also consider programming to be duplicative where the stations involved are located in contiguous time zones and the hour of broadcast differs by one hour. *Id.* at 2980 n.186.

[103] NCTA Petition at 12-15. NCTA states that a syndicated program may be duplicative if it is part of a series for which the station has exclusive rights, even if the episodes differ, and that a program may also be considered duplicative regardless of whether it is shown simultaneously or whether the program is not shown at all.

[104] *Id.* at 12 (citing House Report at 94).

[105] *Id.* at 13.

[106] *Id.* at 15.

[107] NAB Opposition at 4-6.

[108] *Id.* at 5.

[109] *Id.* at 5.

[110] *Id.* at 6 (citing 47 C.F.R. §§ 76.62, 76.67).

[111] House Report at 94.

[112] *Compare, e.g.*, 47 C.F.R. § 73.658(v) *with* 47 C.F.R. § 76.55(f) (definition of network).

[113] Section 614(h)(2) provides that a LPTV station must broadcast for at least the minimum number of hours the Commission requires of commercial broadcast stations. The station must adhere to certain Commission requirements regarding non-entertainment programming and employment. The station must address local news and informational needs that full power stations are not adequately serving because the full power stations are distant from the LPTV station's community of license. The station must comply with the Commission's LPTV interference regulations. The station must be within 35 miles of the cable headend and deliver a good quality over-the-air signal to the headend. The station's community of license and the cable system's franchise area both must have been located outside of the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of the LPTV station's community of license must not have exceeded 35,000 on that date. Lastly, there cannot be any full power television station licensed to any community within the county or other political subdivision served by the cable system. 47 U.S.C. § 534(h)(2)(A)-(F).

[114] 8 FCC Rcd at 2981.

cient full power local commercial television stations to fulfill the cable operator's must-carry obligations under Section 614(b).[115]

40. Moran Communications ("Moran") and the Community Broadcasters Association ("CBA") request a revision to the requirement inSection 614(h)(2)(F) that, in order for a LPTV station to be qualified, there cannot be any full power station licensed to any community within the county or political subdivision served by the cable system.[116] Under this exception, Moran and CBA explain, a LPTV station would qualify for must-carry rights if it meets all the requirements of subsections 614(h)(2), except for subsection F, and if none of the full power stations in the county or political subdivision served by the cable system offers local news or informational programming. They contend that when a satellite station is repeating another station's signal and not broadcasting any local news or informational programming to meet the needs of the local community, the satellite station should not be considered a full power station for the purposes of Section 614(h)(2)(F).[117] CBA also argues that a satellite station is a "passive repeater," and because Section 614(h)(1)(b)(i) specifically excludes passive repeaters from the definition of a local commercial television station, it follows that Congress intentionally gave less to repeaters than to originating stations in terms of must-carry rights.[118] Therefore, argues CBA, "[t]he Congressional recognition of the lesser value of repeaters must be incorporated into the must-carry rule. . . ."[119] In opposition, NCTA argues that the Commission cannot rewrite the statute, which defines qualified LPTV stations and governs the must-carry rights of LPTV stations.[120]

41. We agree with NCTA that the provisions of the 1992 Cable Act may not be amended by the Commission through the rule making process. Further, contrary to CBA's interpretation of Section 614(h), satellite stations meet the definition of a local commercial television station, are full power stations pursuant to Section 614(h)(2)(F), and are generally not simply passive repeaters.[121] We disagree with CBA's contention that Congress intended satellite stations to be treated differently from other full power stations when reviewing the statutory requirements a LPTV station must meet to gain must-carry status.[122]

### C. Manner of Carriage Provisions Applicable to Commercial and Noncommercial Stations

#### 1. Content to be Carried

42. Section 614(b)(3)(A) and Section 615(g)(1) require cable operators to carry the primary video, accompanying audio, and line 21 closed caption transmission, in its entirety, of both qualified local commercial and NCE stations when fulfilling their must-carry obligations. With respect to qualified local commercial stations, cable operators also are required, to the extent technically feasible, to retransmit program-related material carried in the vertical blanking interval (VBI) or on subcarriers.[123] Retransmission of other material in the VBI or other non-program-related material (including teletext and other subscription and advertiser-supported information services) is at the discretion of the operator.[124] With respect to local qualified NCE stations, cable operators are required to transmit, to the extent technically feasible, program-related material carried in the VBI, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the VBI or on subcarriers is at the discretion of the operator.[125] Cable operators may, where technically feasible and appropriate, remove ghost-cancelling information carried in a station's VBI if the cable operator applies an adequate alternative methodology at the headend.[126]

43. In the *Report and Order*, we decided that the factors enumerated in *WGN Continental Broadcasting, Co. vs. United Video Inc.* ("WGN"),[127] provide useful guidance for what constitutesprogram-related material.[128] We declined to further define "program-related," noting that carriage of information in the VBI is rapidly evolving. As a result of our reliance on the approach followed in *WGN* for guidance, we rejected a proposal by A.C. Nielsen Company ("Nielsen") to require program identification codes to be carried by a cable system.[129]

44. The *WGN* case addressed the extent to which the copyright on a television program also included program material in the VBI of the signal. The *WGN* court set out three factors for making a copyright determination. First, the broadcaster must intend for the information in the VBI to be seen by the same viewers who are watching the video signal. Second, the VBI information must be available during the same interval of time as the video signal.[130] Third, the VBI information must be an integral part of the program. The court accepted WGN's future programming schedules as an "integral part of the program." The court in *WGN* held that if the information in the VBI is in-

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115 *See* 47 U.S.C. § 534(c)(1); *see also* 47 C.F.R. § 76.56(b)(3).

116 Moran Petition at 4; CBA Comments at 1.

117 Moran Petition at 4; CBA Comments at 1.

118 Moran Petition at 4; CBA Comments at 1.

119 CBA Comments at 3.

120 NCTA Opposition at 7-8.

121 *See* 8 FCC Rcd at 2973, 2982; s *ee also* 47 C.F.R. § 73.6006.

122 Moran and CBA request that we codify the exception in footnote 217 to the qualification requirements of a LPTV station. Moran Petition at 4; CBA Comments at 1 (citing 8 FCC Rcd at 2983 n.217). While the *Report and Order* had suggested the possibility of additional circumstances in which LPTV carriage might be warranted, it now appears that this is an area where the specific statutory provisions and the balancing incorporated therein must necessarily guide our enforcement of the mandatory carriage provisions for LPTV stations.

123 47 U.S.C. § 534(b)(3)(A).

124 *Id.*

125 47 U.S.C. § 535(g)(1).

126 47 U.S.C. § 534(b)(3)(A).

127 693 F.2d 622 (7th Cir. 1982).

128 In the *Report and Order*, we used a cite of 685 F.2d 218 (7th Cir. 1982), which was the original citation for the case, prior to rehearing. *See* 8 FCC Rcd at 2985 n.235. Upon rehearing, the court affirmed the factors on which we are relying.

129 8 FCC Rcd at 2986.

130 The court stated that this could be available on a different channel than the video. 693 F.2d at 626.

tended to be seen by the viewers who are watching the video signal, during the same interval of time as the video signal, and as an integral part of the program on the video signal, then the VBI and the video signal are one copyrighted expression and must both be carried if one is to be carried.[131] While the court did not define an "integral part of the program," the WGN VBI information not only included local news, but also contained future programming schedules for WGN, and the court upheld the VBI as one copyrightable expression with the video signal.[132]

45. Nielsen and INTV request reconsideration of the use of the *WGN* factors when defining "program-related," in so far as their application excludes the carriage of Source Identification Codes ("SID codes") which are used by Nielsen in the preparation of ratings.[133] Nielsen argues that because the SID codes are an integral part of ratings, which support the advertiser-based broadcast industry, a decision to exclude such codes adversely affects the programming and broadcast industries as a whole.[134] Nielsen states that our decision in this context is completely contrary to other decisions in which we have found such material to be program-related.[135] Nielsen also states that the exclusion of SID codes is expressly contrary to Congress' stated intent in adopting the 1992 Cable Act, and ignores specific Congressional directions for the Commission not to transplant arbitrarily Copyright Act concepts to the Communications Act arena.[136] Nielsen refers to guidance provided in the legislative history with respect to program-relatedness.[137] Nielsen argues that if we continue to use the *WGN* analysis, we should at least require that SID codes, which are unique to, and transmitted with, main-channel programming, be carried by cable systems carrying such main-channel programming.[138] INTV further argues that the exclusion of such codes strikes at broadcasters' ability to compete with cable television.[139]

46. NAB also petitions for reconsideration of the use of the copyright test of *WGN*. NAB argues that program-related material on subcarriers or in the VBI need not always be owned by the same copyright holder as the main program because whether or not the same copyright is held by both the main program and the material carried in the VBI has no bearing on whether that material is related to the main program, and therefore, the *WGN* test is inappropriate.[140] NAB argues that there are program-related services that would not meet this test, for example, previews of upcoming programs or a program schedule which may not be related to the main program being aired at that time, but are related to the broadcaster's program service and must therefore be retransmitted.[141] NAB asserts that material which supplements the main program service of the broadcaster should be required to be carried by the cable operator and that "[o]nly if the material is part of a service separately provided to subscribers or consumers, the contents of which do [sic] are not established by reference to the main program service, should cable systems be allowed to choose not to carry it as part of a retransmitted broadcast signal."[142]

47. In its late-filed comments, StarSight Telecast, Inc. ("StarSight") supports the Commission's reliance on the factors enumerated in the *WGN* test, but urges the Commission to defer to the broadcaster to decide what material meets the test.[143] StarSight asserts that if the primary video and the VBI material can be copyrighted together, then the VBI material is program-related and the cable operator must carry the material.[144] StarSight argues that, according to the *WGN* holding, if the broadcaster intends any portion of the information in the VBI to be seen as part of the broadcaster's expression, then it is program-related and cable operators must transmit the VBI with the primary video.[145]

48. Time Warner and NCTA support the use of *WGN* to determine program-relatedness, and to exclude Nielsen source codes. Time Warner argues that NAB does not offer any reason why this test should not be used. Time Warner contends that the Commission correctly determined that Nielsen program codes are not program-related, rather they are intended to measure viewership levels and are not intended to be seen by the viewer of the program.[146] NCTA argues that the inclusion of information in the VBI is left to the discretion of the cable operator and should not be selected by the broadcaster.[147] NCTA states that program-related material is integral matter such as subtitles or trans-

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131 *Id.*

132 Id. at 627.

133 Nielsen Petition at 17-21; INTV Petition at 9.

134 Nielsen Petition at 19.

135 Nielsen Petition at 11-14. Nielsen states that the Commission has long recognized the value of the information provided by SID codes. Nielsen notes that the Commission has authorized the transmission of SID codes for over 20 years in a variety of cases which expound upon the virtue of such codes. *See* Permitting Transmission of Program-Related Signals in the VBI, 43 FR 49331 (October 23, 1978); Program Identification Patterns, 43 FCC 2d 927 (1973); TV Visual Transmission for Program ID, 22 FCC 2d 779 (1970); TV Visual Transmission for Program ID, 22 FCC 2d 536 (1970); Radio Broadcast Services Order, 46 FR 40024 (August 6, 1981). In addition, Nielsen points to its Authorization, which states with respect to its Automated Measurement of Line-up ("AMOL") system's SID codes, "we believe Nielsen's AMOL systems qualifies as a special signal' and should be considered as an integral part of the associated programming within which it is transmitted and is not intended for the use of the viewing public." In *Audiocom Corp.*, 96 FCC 2d 898 (1984), the Commission stated that "SIDS, while not intended for reception by the public, is clearly related to the program material within which it is transmitted and to the normal operation of broadcast service . . . . It is . . . clear that the very nature and purpose of the information to be encoded requires that it be recorded and transmitted as an integral part of its associated program material." *Id.* at 899.

136 Nielsen Petition at 17-20.

137 *Id.* at 9 n.7 (citing House Report at 101) ("|p|rogram-related . . . is not meant to include tangentially related matter such as a reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players.").

138 Nielsen Petition at 22.

139 INTV Petition at 9.

140 NAB Petition at 3.

141 *Id.* at 4.

142 *Id.* at 4-5.

143 StarSight Comments at 9.

144 Id . at 9-10.

145 *Id.* In an *ex parte* presentation, StarSight requested that the Commission determine that its product, which is transmitted in the VBI, meets the *WGN* test. *See* Comments of StarSight at 2-4; Notification of *ex parte* presentation (May 5, 1994). We believe that such a request should not be resolved in the context of a rulemaking proceeding, but rather should be dealt with separately through the special relief process.

146 Time Warner Opposition at 2-3.

147 NCTA Opposition at 6 (citing House Report at 93).

lations, not tangentially related matter such as a reading list or sports scores. NCTA contends the test proposed by NAB is too broad and could include anything.[148]

49. In response to NCTA and Time Warner, Nielsen claims that the use of the *WGN* test could actually preclude the carriage of subtitles for the hearing impaired while including program schedules and news stories not related to the programming.[149] Nielsen asserts that not only are SID codes program-related, but also items such as Cues, which tell a broadcaster or cable system where to insert advertisements. Nielsen contends that these codes are integrally related to the identification of the programming for advertiser-supported broadcast television and are integrally related to the main-channel programming.[150]

50. We continue to believe that the factors articulated in *WGN* provide the best guidance for determining whether material in the VBI is program-related and, therefore, must be carried by the cable system.[151] Accordingly, material that is intended to be seen by the viewers of the main program, during the same time interval as the main program, and which is an integral part of the main program will be entitled to carriage along with the main signal of the must-carry station. However, on reconsideration, we clarify that the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness. WeXbelieve there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute. For example, on reconsideration, although SID codes may not precisely meet each factor in *WGN*, we find that they are program-related under the statute because they constitute information intrinsically related to the particular program received by the viewer. Further, SID codes provide important information that is useful to both broadcasters and cable operators. We note that the 1992 Cable Act recognized the importance of the national ratings period and prohibited cable operators from repositioning or deleting stations during that time.[152] This interpretation is consistent with previous Commission decisions in which SID codes were found to be program related in other contexts.[153] Finally, we reiterate that, in order to be program-related, it is not necessary that the copyright holder in the main program and in the material in the VBI be the same.

**2. Channel Positioning**

51. The 1992 Cable Act provides both commercial and NCE television stations which elect must-carry status the additional right to select the channel position on which they will be carried by the cable system, within certain specified options.[154] Alternatively, the broadcast station and cable operator may agree on a mutually acceptable alternative channel position. We note that, with respect to channel position, a qualified LPTV station enjoys the channel positioning rights of a commercial television station. Section 76.57 is being revised accordingly.

52. Based on comments received in response to the *Notice*, we declined in the *Report and Order* to adopt a formal priority structure for resolving conflicting channel positioning claims.[155] We stated that we expected compliance with the channel positioning requests of broadcasters "absent a compelling technical reason for not being able to accommodate such requests," and that "inconvenience, marketing problems, the need to reconfigure the basic tier or the need to employ additional traps or make technical changes" would not be sufficient reasons to deny a channel positioning request.[156] In addition, we determined that "only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem, will we permit cable operators to carry a broadcast signal on a channel not chosen by the station."[157] We noted that most systems would be able to configure their service to meet this statutory requirement and that a cable system claiming that it cannot meet a channel positioning request for technical reasons will have to provide evidence that clearly demonstrates that inability.

53. In the *Order* adopted July 15, 1993, we addressed certain issues relating to continued carriage of retransmission consent stations and the channel position for "default" must-carry stations.[158] In that *Order*, we stated that cable systems which are required to carry the signal of a default station "shall place that signal on one of the statutorily defined positions, at the system's discretion."[159] Although the footnote to that sentence correctly stated that the station licensee makes the election, the text incorrectly stated "at the system's discretion."[160] We clarify that, as required by the 1992 Cable Act, the choice of statutorily defined channel position is made by the station, not the cable system.[161] The *Order* also determined that, in the event of a conflict, the station making an affirmative election has priority over the default station.[162] Finally, we stated that, where the station making an affirmative election has selected the only statutory channel position available to the default station, the cable system may place the default station on a channel of the cable system's choice, so

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148 *Id.* at 6-7.

149 Nielsen Petition at 2-3.

150 *Id.* at 4.

151 NAB's proposal for making a determination with respect to program-relatedness is broader than either the statute or the legislative history support.

152 *See* Section 614(b)(9); 47 U.S.C. § 534(b)(9).

153 *See* note 135.

154 Section 614(b)(6) provides that the signals of a local commercial television station carried pursuant to the must-carry rules must be carried on either (1) the same channel on which the station is broadcast over-the-air, (2) the cable channel on which it was carried on July 19, 1985, or (3) the cable channel on which it was carried on January 1, 1992. The election, in the absence of conflicts, is left up to the station involved. *See* 47 U.S.C. § 534(b)(6). Similarly, Section 615(g)(5) requires that NCE signals carried pursuant to must-carry requirements must appear on the cable system channel number on which the qualified local NCE station is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station. In either case, another channel number that is mutually agreed upon by the station and the cable operator may be selected. *See* 47 U.S.C. § 535(g)(5).

155 8 FCC Rcd at 2988.

156 *Id.*

157 *Id.*

158 8 FCC Rcd 5083 (1993).

159 *Id.* at 5084.

160 *Id.* at 5084 and n.14.

161 Section 614(b)(6); 47 U.S.C. §534(b)(6).

162 *Id.* at 5084.

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long as that channel is included on the basic tier.[163] Section 76.57 of our rules was amended to reflect the channel positioning options discussed and adopted in the *Order*.[164]

54. NCTA requests a revision to our rules relating to on-channel carriage of UHF stations.[165] NCTA argues that UHF stations should not have on-channel carriage rights where the channel request is outside an operator's basic service tier. NCTA states that the Commission erroneously made the assumption that most cable systems could comply with the on-channel carriage requests of UHF stations by reconfiguring their basic service tier.[166] NCTA claims that this assumption ignores that, for many systems, reconfiguring can only be accomplished through significant expenditures of time and money, and that such reconfiguring conflicts with the ability of subscribers to "buy through" services offered on a per-program or per-channel basis.[167]

55. NCTA claims that providing on-channel carriage to a station outside the system's basic tier line-up entails significant operational and technical problems.[168] NCTA asserts that in order to isolate the UHF station, the cable operator must use filtering devices such as traps, and that, as the number of traps increase, systems experience technical signal quality problems which in turn make the system unable to comply with technical standards. Moreover, NCTA states, the costs of installing traps can be prohibitive, due to, for example, the need to replace all filters on each cable-connected television set in each home.[169] NCTA also claims that the on-channel requirements can cause problems on addressable systems. For instance, NCTA asserts, while a system could scramble all channels surrounding the UHF channel in order to enable basic-only subscribers access to all must-carry stations, it would be required to force expanded basic subscribers to obtain descrambling converter boxes in order to view tiered services that previously were protected by a filter trap.[170]

56. NAB and INTV object to NCTA's request to deny on-channel carriage to UHF stations.[171] NAB states that NCTA's alleged technical problems may, in some instances, make compliance difficult, but that NCTA's solution would preclude a UHF station from ever having on-channel carriage.[172] NAB asserts that the 1992 Cable Act creates an absolute right to channel position, making no distinction between UHF and VHF signals, and providing no technical difficulty exception.[173] NAB and INTV point out that UHF stations have historically had the worst channel position, and that few UHF stations will insist on a high on-channel carriage position far removed from other broadcast station channel positions.[174] In addition, NAB contends, where a cable system does have a severe technical problem, the Commission has already stated that it would grant a waiver. NAB asserts that while NCTA complains that the standard for obtaining a waiver is too high, it fails to explain why or to propose any alternative standard.[175]

57. The 1992 Cable Act provides that the channel position of a station which has elected must-carry rights is a decision to be made by the broadcaster from among the listed statutory alternatives.[176] The Act does not distinguish between VHF and UHF stations. We emphasize that our statements in the *Report and Order* regarding channel positioning apply to UHF, in addition to VHF, stations. As noted there, cable operators must comply with the channel positioning requirements absent a compelling technical reason.[177] Further, in response to a broadcaster complaint regarding denial of a channel positioning request, a cable system will be required to provide evidence to the Commission clearly demonstrating that the operator cannot meet the request for technical reasons.[178] As part of such a showing, a cable operator may present evidence as to the costs involved in remedying the technical problem.

### 3. Signal Quality

58. In the *Report and Order*[179] and the *Clarification Order*[180] we addressed issues relating to the signal quality of a broadcast station asserting must-carry rights. We noted that Section 614(h) established specific minimum signal levels for a good quality signal of a commercial television station (*i.e.*, -45 dBm for UHF signals and -49 dBm for VHF signals). Neither the 1992 Cable Act nor the Commission's *Orders* specifically stated what would be considered a "good quality signal" for must-carry purposes with respect to noncommercial stations, educational translator stations, and low power television stations.[181] We do so now, on our own motion.

59. We note that in a *Memorandum Opinion and Order*,[182] the Mass Media Bureau decided to utilize the standards for commercial television stations as *prima facie* tests to initially determine, absent other evidence, whether noncommercial stations place adequate signal levels over a

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[163] *Id.* at n.16.
[164] *See* 47 C.F.R. § 76.57(e).
[165] NCTA Petition at 8-12.
[166] *Id.* at 9.
[167] *Id.* at 9, 11. NCTA is referring to the requirement in Section 3 of the 1992 Cable Act which provides that subscribers to the basic tier should be permitted to purchase pay-per-view or per-channel services without being required to purchase intermediate tiers of service. *See* 47 U.S.C. § 543(b)(8); Report and Order , 8 FCC Rcd 2274 (1993) ("Tier Buy-Through Order").
[168] NCTA Petition at 9-10.
[169] *Id.* at 10.
[170] *Id.* at 10-11. *But see supra* para. 16, relating to the cost to subscribers for converter boxes provided for the sole purpose of obtaining must-carry signals.
[171] NAB Opposition at 1-3; INTV Opposition at 5.
[172] NAB Opposition at 2.
[173] *Id.*
[174] *Id.* at 3; INTV Opposition at 5.
[175] NAB Opposition at 3; INTV Opposition at 5.
[176] Section 614(b)(6); 47 U.S.C. § 534(b)(6).
[177] 8 FCC Rcd at 2988. As noted above, inconvenience, marketing problems, the need to reconfigure the basic tier or to employ additional traps or make technical changes are not sufficient reasons for denying the channel positioning request of a must-carry signal. Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem will we permit cable operators to carry a broadcast station on a channel not chosen by the station. *Id.*
[178] *Id.*
[179] *Id.* at 2988-91.
[180] 8 FCC Rcd at 4144.
[181] Section 615(g)(4) states that the Commission may define a "signal of good quality" for noncommercial stations.
[182] *See Memorandum Opinion and Order* (Independence Public Media of Philadelphia, Inc. against Suburban Cable TV Co., Inc.) (CSR-3806-M), 8 FCC Rcd 6319 (1993).

cable system's principal headend.[183] The Mass Media Bureau has relied on this test in processing must-carry complaint cases and we believe that is appropriate. With respect to low power and NCE translator stations, we are adopting the same signal quality standard of -49 dBm for VHF and -45 dBm for UHF signals.

60. With respect to the manner of testing for a good quality signal, we find that the Mass Media Bureau has adopted an appropriate method for measuring signal strength in the *Memorandum Opinion and Order*.[184] Generally, if a test measuring signal strength results in an initial reading of less than -51 dBm for a UHF station, at least four readings must be taken over a two-hour period. If the initial readings are between -51 dBm and -45 dBm, inclusive, readings must be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. For a VHF station, if the initial readings are less than -55 dBm, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[185]

61. Cable operators are further expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: (1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; (2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; (3) height of the antenna above ground level and whether the antenna was properly oriented; and (4) weather conditions and time of day when the tests were done. We believe that adherence to these procedures and requirements will result in fewer disputes over the signal quality of broadcasting stations.[186]

### D. Procedural Requirements

#### 1. Compensation for Carriage

62. *Copyright Liability.*[187] Under the 1992 Cable Act, a cable operator is generally not required to carry a station that would otherwise qualify for must-carry status if the station would be considered distant for copyright purposes,[188] unless the station indemnifies the cable operator for its copyright liability.[189] The Commission required cable operators to notify local commercial and noncommercial stations by May 3, 1993 that they may not be entitled to must-carry status because their carriage may cause an increased copyright liability.[190] In the *Report and Order*, the Commission stated that it expected cable operators and broadcasters to cooperate with each other to ensure that operators are compensated for the cost of carriage of "distant" must-carry signals and that broadcast licensees pay only their fair share.[191] The Commission stated that each licensee should be responsible for the increased copyright costs specifically associated with carriage of its station as a must-carry signal and that stations should be counted in the order they satisfy all the necessary conditions for attaining must-carry status. The Commission also determined that it would be reasonable for a cable operator to receive a written commitment for such payments from a broadcaster in return for an estimate of the broadcaster's expected copyright liability, based on previous payments and financial information.

63. On May 28, 1993, the Commission adopted a *Clarification Order* ("Clarification") that, among other things, addressed certain copyright issues.[192] We stated that we would require a cable operator to provide a broadcast station with a good faith estimate of the potential copyright liability for carriage of the station during the next copyright accounting period, as well as a copy of the most recent form filed with the Copyright Office for existing distant signal carriage that details the payments made for carriage of distant signals. The cable operator, however, is not required to make legal judgments pertaining to the amount of indemnity involved. In addition, a cable operator is required to provide such information within three business days of receipt of a written request from a broadcaster.[193] Any cable operator not providing sufficient in-

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[183] *Id.* 6

[184] *See id.* We note that these standards have been followed by the Cable Services Bureau.

[185] *Id.*

[186] *Id.* at 6319-20.

[187] We note that the Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477, which was signed into law on October 18, 1994, includes a provision to amend Section 111(f) of title 17, United States Code, specifically with reference to the definition of "local service area of a primary transmitter" by inserting after "April 15, 1976," the following: "or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations,". We acknowledge that there may be some effect on pending petitions and on our current rules. We will revisit, to the extent necessary, those rules and policies which may be affected.

[188] *See* Copyright Act, 17 U.S.C. § 111.

[189] Sections 614(b)(10) and 615(i)(2). However, a qualified local noncommercial station that has been carried continuously since March 29, 1990 is not required to reimburse a cable operator for its copyright liability to retain its must-carry status. *See* 47 C.F.R. §§ 76.55(c)(2) and 76.60(b). In addition, a distant noncommercial station that has been imported prior to March 29, 1992, and which continues to be imported to meet the statutory requirements of Section 615, shall not be required to reimburse for copyright liability. *See* supra para. 7, regarding the importation requirements; *see also* 47 C.F.R. §§ 76.55(b)(3), 76.55(c)(2), and 76.60.

[190] *See* 47 C.F.R. § 76.58(d).

[191] 8 FCC Rcd 2993. We clarify that, in situations where copyright liability is incurred for carriage in some of the communities served by a single cable system, the broadcaster must indemnify the operator for that copyright liability for carriage in any community served by the system, unless the operator is able to provide different channel line-ups to the different communities.

[192] 8 FCC Rcd 4142 (1993).

[193] 8 FCC Rcd at 4144. In its opposition, Time Warner argues that cable operators should be given at least seven days, not three, to respond to any requests for information regarding copyright liability. Time Warner Opposition at 7. We reject

formation to a broadcast station regarding potential copyright liability in the required timely fashion may be subject to Commission sanctions.

64. In their reconsideration petitions, NAB and INTV state that we should not require that agreements for copyright reimbursement be open ended, rather parties should be permitted to limit such agreements to one or more semi-annual accounting periods.[194] Petitioners argue that any requirement that agreements to indemnify for copyright cover the entire three-year election period may force broadcasters to pay costs that they do not wish to, especially if the copyright liability changes for some unforeseen reason.[195] NAB specifically proposes that broadcasters be required to make a minimum one-year commitment, with a notice of at least 60 days prior to the next semi-annual accounting period before indemnification can be terminated.[196] Cable interests reject the proposal to allow agreements for less than the entire three-year election period.[197] They contend that the broadcasters' approach is contrary to the statutory scheme that is based on a three-year election period. Furthermore, NCTA asserts that to allow shorter agreements essentially allows a station to change its election to retransmission consent.[198] In its reply, NAB counters that its recommendations regarding the commitment for indemnification is consistent with the decision in the *Clarification* that the three-year election period has no bearing on when a station is able to take steps necessary to secure its must-carry rights.[199]

65. We concur with INTV and NAB that stations should be able to commit to copyright indemnification for periods shorter than the three years specified in the 1992 Cable Act. In light of the numerous factors that affect the liability payments, we believe that commitments can be for periods as short as one year (two six-month accounting periods). Otherwise, a station may be required to make a commitment that cannot be fulfilled, thereby leading to protracted litigation. However, in fairness to cable operators, we support NAB's proposal that broadcasters notify cable operators 60 days prior to termination of any agreements to indemnify them for copyright liability. In particular, this will provide sufficient time for cable operators to notify subscribers regarding the deletion of the station.[200] Further, we disagree with NCTA that to permit agreements for periods of less than three years essentially allows stations to revert to retransmission consent. A station electing must-carry status remains a must-carry station for the entire three-year period, but, in situations where the station is considered distant for copyright purposes, a cable operator is not obligated to honor that election unless it receives a commitment for copyright reimbursement. Further, we note that where a station does not initially meet the criteria for must-carry status, it subsequently may assert its rights once it satisfies the conditions for must-carry status.[201]

66. In a related matter, NAB requests that cable operators provide broadcasters with advance notice of any actions, such as retiering, that may affect the copyright liability before the broadcaster is required to enter into an indemnification agreement.[202] Time Warner states that the requirement that cable operators inform stations of plans that might affect copyright liability has no basis in law and that the requirement of an estimate of liability should be sufficient.[203] United Video opposes such a requirement because many of the changes that affect copyright liability are not predictable.[204]

67. NAB further asks for a clarification that a station need not agree to indemnify a cable system unless and until copyright liability actually is incurred. NAB claims that some cable operators are requesting commitments for indemnification should such liability be incurred at any time during the three-year election period, even though there is no copyright liability for carriage of the station at this time.[205]

68. We find it appropriate to require cable operators to notify a broadcaster of any change in service that will have an unexpected change on the amount of copyright reimbursement that will be required to maintain its must-carry status.[206] We believe it is reasonable to expect a cable operator to inform a must-carry station when the estimated cost of continued carriage may change. We also agree with NAB that it is inappropriate for broadcasters whose stations do not cause a copyright liability for the cable system to be required to commit to indemnification before such liability is actually incurred. In both cases, a change in a station's potential copyright liability may affect its decision whether to retain its must-carry status by indemnifying the cable operator or to cede its must-carry rights. Accordingly, we will require cable operators to notify broadcast stations at least 60 days prior to any unexpected change on their copyright status. This will allow sufficient time for the station to determine whether it wishes to continue carriage and, if not, it will give the cable operator enough time to send out the required notice of deletion of a signal. However, the broadcast station must indemnify the cable operator for costs incurred during that copyright accounting period, but not for additional costs once the broadcaster has notified the cable operator that it will discontinue must-carry status in light of changes proposed, but not yet effectuated, by the cable operator.

69. *Calculation of station liability.* INTV and NAB request clarification regarding the method for determining the incremental copyright liability attributable to a particular

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Time Warner's proposal and note that in the *Clarification* we observed that the information that must be provided to broadcasters should be readily available to the cable operator. 8 FCC Rcd at 4144.

[194] NAB Petition at 10; INTV Petition at 5.

[195] INTV Petition at 2-3; NAB Petition at 10.

[196] NAB Petition at 10.

[197] NCTA Opposition at 2; Time Warner Opposition at 7-8; United Video Opposition at 5.

[198] NCTA Opposition at 2.

[199] NAB Reply at 2-3.

[200] *See* 47 C.F.R. § 76.58. We note that this rule also requires notification of the affected broadcast station, although in such instances the deletion will be at the request of the broadcaster.

[201] *See* 8 FCC Rcd 4142.

[202] NAB Petition at 9-10.

[203] Time Warner Opposition at 9.

[204] United Video Opposition at 4.

[205] NAB Reply at 4.

[206] For example, as petitioners point out, there are some circumstances where a permitted signal subject to a .563% royalty rate may become a penalty station and require a payment of 3.75% of the system's gross revenues. *See* NAB Reply at 3.2

station.[207] NAB proposes a method for averaging rates over affected stations as a way to prevent cable operators from manipulating the copyright liability associated with a particular station.[208] Under NAB's approach, if more than one local station is carried pursuant to a reimbursement agreement, and none is carried at the 3.75% penalty rate, the lowest marginal royalty rates paid for the total number and types of non-3.75% stations should be added and then divided among those stations in proportion to their distant signal equivalent values.[209] Thus, each station will reimburse the system for the average rate paid for the entire group of permissible (non-3.75%) distant stations, and the system will be reimbursed for the entire amount of royalties paid for carriage of these stations. NCTA and Time Warner oppose NAB's proposed formula.[210] In particular, NCTA states that each distant station's share is a function of a statutorily established formula, and therefore an operator cannot manipulate the process. NCTA is also concerned that cable operators will not be fully reimbursed if this methodology is used. To avoid protracted disputes, NCTA argues that the cable operator must be able to designate which distant signal accounts for which incremental cost. United Video supports the decision in the *Report and Order* to calculate the incremental copyright fees on the basis of the royalty fee associated with the last added distant signal.[211] It and Time Warner explain that most stations that are added will be subject to the 3.75% penalty rate since cable operators are already carrying the maximum number of distant signals permitted at the lower rate.[212]

70. We indicated in the *Report and Order* that increased copyright liability should be specifically associated with the carriage of each station and further that "stations should be counted in the order they satisfy all the necessary conditions for attaining must-carry status."[213] However, this statement does not accurately reflect the reality of copyright liability, nor does it adequately address the concern that cable operators may have the ability to manipulate the liability of stations which have been historically carried on the system, or which are added pursuant to must-carry.[214] We note that NAB is correct in stating that the copyright liability is determined according to the sequence by which the signal is added to the system.[215] Section 111(d) of Title 17 provides the method for calculating copyright royalties to be paid by a cable system. In addition, the copyright rules provide specific information regarding statements of account and methods of computation for the payment of copyright royalties.[216] We agree with NCTA that the copyright rules determine the manner in which the cable operator will have to pay royalties for each station carried.

71. In an effort to eliminate confusion in making the determination of increased liability associated with each station, we believe that stations which were carried prior to the implementation of must-carry should continue to be accounted in the same manner with respect to the sequence of signal carriage. Stations which were or are added by the system should have their copyright liability based on the sequence by which the signal was or is added to the system. In the event multiple signals are added on the same day, the sequence of incremental increase in liability should be based on the order in which the stations met all necessary conditions for attaining must-carry status. We anticipate that providing the station with the statement of account filed with the Copyright Office will ensure the station the opportunity to review how this process is achieved. Therefore, we decline to adopt an alternative system for determining the copyright liability of individual stations' carriage on a cable system.

72. The Commission's must-carry requirements became effective on June 2, 1993, during a Copyright Office accounting period.[217] INTV argues that stations should be required to pay no more than a *pro rata* share of the first accounting period for carriage between June 2 and June 30.[218] NCTA and Time Warner oppose this approach and state that the Copyright Office does not allow prorations of such payments and therefore stations should bear the full cost of carriage for the entire six-month period.[219] Specifically, Time Warner observes that for a must-carry station that was added on June 2, the copyright liability is calculated as though the station were carried for the entire period.[220] INTV, in its reply, contends that NCTA and Time Warner misinterpret its *pro rata* approach. It states that it was referring only to situations where the cable operator carried the signal prior to June 2 without regard to reimbursement. In such cases, INTV argues that the cable operator should not be entitled to a windfall from the station.[221]

73. Prior to the implementation of the must-carry rules, carriage of any station was at the discretion of the cable operator. In such cases, the cable operator carried such a signal even though it incurred a copyright liability for the period ending June 30, 1993. That liability did not increase due to a change in our regulations for stations which had previously been carried, and therefore the liability had already been assumed. We do not believe it appropriate to require the broadcast station to reimburse for that liability, even if carriage became mandatory on June 2, 1993. However, with respect to a broadcast station which was not previously carried by the cable system and which immediately asserted its must-carry rights on June 2, 1993, we believe that such station should reimburse the cable operator for any increased copyright liability incurred as a

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[207] INTV Petition at 7; NAB Petition at 11-12.
[208] NAB Petition at 11-12; NAB Reply at 5-7.
[209] NAB notes that its proposal does not deal with signals which are currently being carried for which a 3.75% royalty rate is incurred. NAB Petition at 12.
[210] NCTA Opposition at 3-4; Time Warner Opposition at 9-10.
[211] United Video Opposition at 1.
[212] *Id.* at 3; Time Warner Opposition at 10.Z
[213] 8 FCC Rcd at 2993.
[214] NAB Petition at 11; United Video Petition at 1-3.
[215] NAB Petition at 11.
[216] *See* Statements of Account Covering Compulsory Licenses for Secondary Transmission by Cable Systems, 37 C.F.R. § 201.17.
[217] 47 C.F.R. § 76.56(b). The Copyright Office divides the year into two accounting periods -- January 1 to June 30 and July 1 to December 31.
[218] INTV Petition at 5.
[219] NCTA Opposition at 2; Time Warner Opposition at 10-11.
[220] Time Warner Opposition at 10.
[221] INTV Reply at 1-2.

result of adding that signal between June 2, 1993 and June 30, 1993. Therefore, in the case of a station that agreed to be added on June 2 and committed to indemnification, the station is responsible for the whole semi-annual fee. In particular, the station had the opportunity to postpone satisfying the conditions of must-carry status until the first day of the next Copyright Office accounting period.

74. INTV seeks to establish a rebuttable presumption that all stations are significantly viewed throughout their ADIs. It argues that this option would not alter the 1976 signal carriage rules, but would eliminate the copyright liability for carriage of such stations.[222] Time Warner and NCTA oppose this proposal because it would defeat the intent of the 1992 Cable Act to exclude from must-carry those stations that are considered distant for copyright purposes. In addition, petitioners assert that this proposal improperly shifts the burden to cable operators to rebut the presumption.[223] In its reply, INTV claims that NCTA and Time Warner offer no valid reason for rejecting its proposal to presume a station is significantly viewed throughout its ADI. It also argues that, since parties would only come to the Commission to rebut the significantly viewed status of a station, the argument regarding the potential administrative burden is speculative.[224]

75. We recognize that there may be some merit in considering alternative procedures for addressing significant viewing showings and that there may be both policy and efficiency reasons for attempting to parallel ADI and significant viewing service area decisions. The INTV proposal, however, is in our view sufficiently novel that it is not appropriately considered in the context of this proceeding. This is particularly the case since the significant viewing process has ramifications in terms of other rules, such as the network nonduplication rules, that are not the subject of this proceeding.[225]

**2. Remedies**

76. Section 615(d)(1) and Section 615(j) provide for the resolution of carriage and channel positioning disputes between a broadcast station and a cable operator. With respect to commercial stations, the 1992 Cable Act requires a local commercial station to notify the cable operator of an alleged violation, and requires the cable operator to respond to such a notice, prior to the station's filing a complaint with the Commission. However, with respect to NCE stations, the 1992 Cable Act permits a NCE station to file a complaint with the Commission prior to notifying the cable operator. In the *Report and Order* we discussed these provisions and adopted rules for their implementation.[226] Upon review of those rules, we find it necessary to make some adjustments on our own motion, as they relate to the filing of a complaint by a NCE station.

77. As indicated above, a NCE station is not required to notify a cable operator prior to filing a complaint with the Commission. In the *Report and Order*, we stated that "it is anticipated, though not required, that if there is any question relating to the carriage obligations of the cable system, the NCE station will make inquiries of the cable system prior to filing a complaint."[227] We also stated that if a NCE station wanted to follow the procedures outlined for complaints filed by a commercial broadcasting station, it could do so as long as it notified the cable system of such intent. In establishing the - time frames by which any broadcaster (commercial, noncommercial or LPTV) should file a complaint, we stated that such complaint should be filed within 60 days of an "affirmative action" by a cable operator which directly affects the carriage rights of a broadcast station.[228] We then proceeded to define "affirmative action" as the denial by a cable operator of a request for either carriage or channel position, or the failure of a cable system to respond to such a demand within the required 30-day time frame.[229] It appears that by establishing such a 60-day requirement based upon an "affirmative action," we have made the complaint procedure for NCE stations more rigorous than was intended, either by our rule or the intent of the 1992 Cable Act. Therefore, for the purposes of a NCE station complaint, we are revising Section 76.7 to allow a NCE station to file a complaint at any time it determines that its carriage rights have been violated. We believe this better reflects the language of the 1992 Cable Act and will eliminate the possibility that a NCE complaint would be dismissed based solely on a failure to meet the 60-day time frame, prior to having the merits of the complaint considered.

## III. RETRANSMISSION CONSENT

**A. Definition Issues**

**1. Multichannel Video Programming Distributors.**

78. Section 325(b)(1) provides that "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, . . . ," except with express authorization of the station or if carried pursuant to must-carry.[230] Section 602(12) of the Communications Act defines a multichannel video programming distributor as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service (MMDS), a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[231]

79. In the *Report and Order* we found that "local broadcast signals provided by MATV facilities or VHF/UHF antennas on individual dwellings situated within the station's broadcast service area are not subject to retransmission consent, provided that these signals are available without charge at the resident's option."[232] We further stated that this exemption applies to MATV-

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222 INTV Petition at 6.
223 NCTA Opposition at 2-3; Time Warner Opposition at 13.
224 INTV Reply at 5.
225 *See also* discussion at n.187, *supra*, with respect to the amendment to Section 111(f) of title 17 of the United States Code.
226 *See* 47 C.F.R. § 76.7, relating to the filing of petitions for special relief.
227 8 FCC Rcd at 2994.
228 *Id.* at 2995.
229 *Id.*
230 Section 325(b)(1); 47 U.S.C. § 325(b)(1).
231 Section 602(12); 47 U.S.C. § 522(12).
232 8 FCC Rcd at 2997.

SMATV, MMDS-SMATV and MMDS-individual antenna combinations, so long as there is no charge. The analogy used was that of an individual purchasing and installing a roof top antenna to receive broadcast signals.[233] This exception to retransmission consent was added to the Commission's rules as Section 76.64(e).[234] The determining factor used in the rule relates to antenna ownership, not the provision of the service free-of-charge.

80. The Wireless Cable Association ("WCA") contends that the Commission should eliminate the requirement that the wireless cable operator must divest itself of ownership and control of the VHF/UHF antenna in order to avoid retransmission consent obligations.[235] WCA claims that wireless cable operators provide service to individual homes and multiple dwelling units through a combination of a standard VHF/UHF antenna on the same mast as a microwave antenna and that wireless operators generally offer the VHF/UHF antenna as an amenity to ensure that all of the signals received by the subscriber are of the highest quality. Further, explains WCA, such operators generally do not charge for the provision of this service to the extent that, in multiple dwelling units, all residents (including non-subscribers) receive the local broadcast signals over the VHF/UHF antenna supplied by the wireless cable operator. With respect to single family homes, WCA states that the wireless operator does not charge for the antenna and the operator retains ownership so that if the subscriber terminates service, both the VHF/UHF antenna and the microwave antenna are recoverable and may be reused.[236]

81. WCA argues that the ownership or control of the antenna should not be the determining factor as to whether retransmission consent must be obtained. WCA proposes instead that as long as the broadcast signals are provided free-of-charge over a VHF/UHF antenna, then the ownership of the antenna should not matter.[237] WCA, in its motion for a stay, pointed to the unintended effects of the existing rule. WCA claims that where a wireless operator has obtained retransmission consent from all but one local broadcaster, that broadcaster's refusal will effectively negate the consent of all other broadcasters.[238] The wireless operator would immediately be forced to disable or retrieve all of the VHF/UHF antennas in the field. Without the ability to provide common VHF/UHF antenna service to homeowners, even without a charge, to improve reception of local broadcast signals, the wireless cable operator will be unable to effectively compete in the marketplace. Alternatively, if the operator must immediately transfer the ownership and control of the antennas to each individual subscriber, at a significant financial loss to the operator, such operator will be unable to reuse such equipment. If the subscriber is asked to pay the operator for the antenna, WCA claims that most subscribers will discontinue service.

82. Cable operators oppose WCA's request, claiming that such a revision to the rule would create a loophole for wireless cable operators to avoid the retransmission consent provisions entirely. NCTA states that a wireless operator could simply structure its billing in such a way as to indicate that no charge was made to the subscriber for the receipt of broadcast signals, and the operator would be exempt from the provisions.[239] Time Warner argues that the legislative history clearly shows that all multichannel distributors are required to obtain consent, and there is no indication that MMDS operators should be given any special treatment. Time Warner states that Congress intended that a viewer who owns his own antenna is very different from the viewer who receives the signal through an antenna owned by the MMDS operator.[240] In the latter case, the MMDS operator is acting in the same capacity as a traditional cable service. NCTA argues that we should not allow "MMDS operators to gain a competitive advantage over cable systems and take themselves outside the constraints of retransmission consent," and that such action can not be "squared with the [1992 Cable] Act and should not be adopted."[241]

83. We agree with NCTA and Time Warner that a wireless operator meets the definition of a multichannel video programming distributor ("MVPD") and generally would be responsible for obtaining retransmission consent for all broadcast signals retransmitted over their system. We are cognizant of Congress' desire not to affect a viewer who receives these broadcast signals over an antenna not owned by a MVPD.[242] The application of the retransmission consent requirement to MMDS and SMATV facilities was an effort to create regulatory parity between these types of operations and cable systems. In the *Report and Order*, the Commission expressed its belief that to the extent the signal reception involved was under the control of the individual subscriber and the signals involved were not being "sold" by the MMDS and SMATV operators, the consent requirement should not apply. In addition, and in recognition of the concerns raised by WCA, we find that retransmission consent is not required if the broadcast signal reception service is received without a separate subscription charge and the antenna is either (1) owned by the subscriber; or (2) under the control of the subscriber and available for purchase by the subscriber upon termination of service. We believe that this interpretation upholds Congressional intent without causing undue disruption to subscribers. We will amend Section 76.64(e) of our rules to reflect this change.

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[233] *Id.*

[234] 47 C.F.R. § 76.64(e) states that "[p]rovision of local broadcast signals by master antenna television (MATV) facilities or by VHF/UHF antennas on individual dwellings is not subject to retransmission consent, provided that these signals are available without charge at the residents' option. That is, the antenna facilities must be owned by the individual subscriber or building owner and not under the control of the multichannel video programming distributor." On October 5, 1993, at the request of the Wireless Cable Association ("WCA") and the National Private Cable Association ("NPCA"), we adopted a *Stay Order* with respect to Section 76.64(e), pending our resolution of this issue. *Stay Order*, 9 FCC Rcd 2678.

[235] WCA Petition at 3.

[236] *Id.* at 5-7.

[237] *Id.* at 8-9.

[238] *Id.* at 3 n.5.

[239] NCTA Opposition at 9.

[240] Time Warner Opposition at 15-16 (citing Senate Committee on Commerce, Science and Transportation, S. Rep. No. 92 ("Senate Report"), 102d Cong., 1st Sess. (1991) at 34).

[241] NCTA Petition at 8-9.

[242] *See* Senate Report at 36.

### B. The Scope of Retransmission Consent

#### 1. Radio

84. In the *Report and Order* we concluded that Congress intended to provide retransmission consent to all broadcast signals, including those retransmitted by radio.[243] Petitions for reconsideration argue that the retransmission consent provisions of Section 325 and the must-carry provisions of Sections 614 and 615 were intended to work in concert and, therefore, because the must-carry provisions apply only to broadcast television signals, Congress intended retransmission consent to apply only to broadcast television signals.[244] Cable operators argue that most cable systems carry radio stations as an all-band offering, meaning that as with any standard radio receiver, all stations which deliver a signal to the antenna are carried on the system. They contend that the refusal of one radio station to grant consent would preclude all other radio stations from being carried in the all-band method. Several commenters assert that cable operators are more likely to drop the all-band radio offering, rather than attempt to bargain for retransmission consent from all stations carried.[245]

85. We continue to believe that Section 325, as amended by the 1992 Cable Act, applies to radio signals as well as television signals. The statutory language and the legislative history support this conclusion and we have not been presented with a credible argument for reading the statute otherwise.[246] Section 325(b)(2) expressly exempts certain broadcast stations from the consent provision, and radio stations are not included in these exceptions.[247] However, with respect to the difficulty of obtaining consent for all stations carried in an all-band method, we believe that cable systems have a legitimate concern. In order to make possible the offering of an "all-band" FM radio service, cable operators need only seek the consent of stations within the usual reception area of a high power FM station. Therefore, cable systems must obtain consent from all stations which are located within 92 km (57 miles) of the cable system's receiving antenna(s).[248] Other stations, in the absence of specific notice to the contrary, will be presumed to be insufficiently present to be considered carried in the all-band reception mode. This should eliminate concern over obtaining consent from signals which fade in and out of an all-band offering due to atmospheric conditions.[249] Alternatively, a cable system may choose to use a filtering device to eliminate those radio stations from an all-band offering for which the cable operator is unable or unwilling to obtain consent. This change will be reflected in Section 76.64 of our rules, under a new subpart (n).

#### 2. Low Power Television Stations

86. In concluding in the *Report and Order* that low power television stations are entitled to retransmission consent, we stated that low power television stations are "television broadcast stations."[250] We incorrectly stated, however, that a low power station meets the definition of television broadcast station in Section 76.5 of our rules. Section 76.5(b) defines television broadcast station as "any television broadcast station operating on a channel regularly assigned to its community by § 73.606 of this chapter . . . ." A low power television station, defined in Section 74.701(f), however, is authorized under subpart G of Part 74 of our rules. However, we continue to believe that the statute was clear that low power television stations are entitled to assert retransmission consent over their signals.

#### 3. Exceptions to the Retransmission Consent Requirement

87. Section 325, as amended by the 1992 Cable Act, provides four exceptions to retransmission consent. Section 325(b)(2) states that retransmission consent shall not apply to the retransmission of NCE stations, retransmission directly to a home satellite antenna, the retransmission of the broadcast signal of a network directly to a home satellite antenna of an unserved household, or the retransmission of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.[251] Petitions for reconsideration have been filed regarding the interpretation of the fourth exception.

88. On May 26, 1993, the Commission adopted an *Order* denying a Request for Stay submitted by Yankee Microwave, Inc. ("Yankee").[252] In subsequent pleadings Yankee requested reconsideration of that *Order*, or alternatively, the immediate grant of its petition for reconsideration. Yankee sought relief, on behalf of its cable system customers, from the provision of Section 76.64(b)(2) regarding the superstation exception. Alternatively, Yankee requested revision of that section of our rules so it would apply to microwave carriers of a superstation signal, as well as to satellite carriers of such a signal. By *Order* of the Chief, Mass Media Bureau, a temporary waiver was granted to Yankee upon a finding by the Bureau that Yankee would suffer irreparable harm if the provisions of the rule were enforced prior to our decision on the pending petitions for reconsideration.[253] On October 5, 1993, the Mass Media Bureau adopted an *Order* which denied a similar request filed by EMI, Inc. ("EMI") primarily based on that party's lack of a showing of imminent harm.[254] We now address the requests and oppositions raised by parties to this proceeding.

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[243] 8 FCC Rcd at 2998.

[244] CATA Petition at 7-8; Newhouse Broadcasting Petition at 8-10; United Video Opposition at 5-6. Time Warner supports these requests.

[245] CATA Petition at 7-8; United Video Opposition at 5-6.

[246] *See* Senate Report at 34-36.

[247] Section 325(b)(2); 47 U.S.C. § 325(b)(2).

[248] The distance of 92 km was selected as a result of the Commission's allotment policies relating to FM radio stations. Because the predicted service contour of a Class C FM radio station is 92 kilometers, the use of such a distance will ensure that retransmission consent is obtained from FM radio stations received by the cable system's receiving antenna(s). *See* 47 C.F.R. § 73.211.

[249] We note that although the cable operator is not required to obtain retransmission consent from stations outside the 92 km zone, any such station that is received and retransmitted by the cable system may affirmatively refuse to grant, or negotiate for compensation in return for granting, retransmission consent to the cable operator.

[250] 8 FCC Rcd at 2998.

[251] *See* Section 325(b)(2); 47 U.S.C. § 325(b)(2); 47 C.F.R. § 76.64(b)(2).

[252] 8 FCC Rcd 3938 (1993).

[253] *Order*, 8 FCC Rcd. 6248 (1993).

[254] Order, 8 FCC Rcd 7583 (1993).

89. In the *Report and Order* we rejected arguments that the retransmission consent requirement should not apply to superstation signals delivered via terrestrial means such as microwave.[255] Petitions for reconsideration argue that the effect of the rule is to unfairly discriminate in favor of satellite carriers to the detriment of alternative delivery methods such as microwave. Newhouse argues that the Commission has "elevated form over substance" in its interpretation of the superstation exception.[256] These petitions for reconsideration refer to the inclusion of the words "or common carrier" in the Senate version of the statute, claiming that although there is no indication why these words were dropped from the final version of the bill, the failure to include them does not evidence an intent by Congress to discriminate against microwave carriers in the manner that has resulted.[257] Yankee submits that Congress left room for interpretation of the statute, in a manner consistent with the intent and purpose of the 1992 Cable Act, where failure to do so would have effects contrary to the stated purpose of the Act.[258] Specifically, the parties point to Section 623(b)(7)(A)(iii) of the 1992 Cable Act which excepts from carriage on the basic tier those broadcast signals "secondarily transmitted by a satellite carrier beyond the local service area of such station."[259] According to Newhouse, in order to make these provisions consistent with one another, it is the emphasis on secondary transmission by satellite which should control, not the manner of delivery of such a satellite signal. NCTA states that there is no public interest justification for exempting superstations delivered by satellite but not those delivered by microwave.[260]

90. No party has objected to this request or filed comments, other than WSBK, Boston, which stated that it did not object to the transmission via microwave of its signal outside the local market of its station.[261] We are persuaded by commenters that the unintended effect of the rule is to unfairly discriminate against alternative methods of delivery of a superstation signal. We believe, consistent with the stated purpose and intent of the 1992 Cable Act, that it is the delivery of satellite signals, not the manner of delivery which should be excepted from the retransmission consent requirement. In other words, if a superstation meets the definition of "superstation" contained in the Copyright Act, then the manner of delivery of such a signal shall not control. However, as discussed more fully below, the exception will only apply to delivery of such a superstation signal outside the local market of the station.

91. *Rights of superstations within the local market.* Section 614 defines a local commercial broadcast station as any full power commercial television broadcast station licensed by the Commission that is located in the same television market as the cable system. As long as the local commercial broadcast station delivers a good quality signal and agrees to indemnify the cable system for any additional copyright liability, the station is entitled to must-carry rights within the local market. Otherwise, that station has the right, pursuant to Section 325(b)(4)-(5), to elect retransmission consent. Section 325 states that the term "superstation" shall be defined according to Section 119(d) of Title 17 of the United States Code. Section 119(d) of Title 17 defines a superstation as "a television broadcast station other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier."[262] Tribune Broadcasting Company, INTV, Chris-Craft, WSBK License, Inc. and Turner Broadcasting System, Inc. request that the Commission affirm that for purposes of electing between must-carry or retransmission consent, a superstation is a local commercial station for any cable system located in the same market, and that as such, these stations may elect either must-carry or retransmission consent status within the local market.[263] Consequently, these parties argue that such a signal should not be retransmitted within the local market without consent (unless carried pursuant to must-carry), whether the retransmission occurs over-the-air or via satellite. The parties agree that outside the local market, the superstation may not assert retransmission consent for the receipt of its signal via satellite or other common carrier (such as microwave delivery). Alternatively, Time Warner asserts that no superstation has any rights in or out of its local market, as long as the signal is received via satellite. Time Warner would deny must-carry and retransmission consent to these stations as long as they meet the definition of a superstation.[264]

92. We believe that Congress intended for all local commercial broadcast stations to have the option to assert either must-carry or retransmission consent within their individual market. These local commercial broadcast stations do not become superstations until such time as they are retransmitted via satellite outside their market, an activity unrelated to their status as local commercial broadcast stations within their market. Therefore, such local commercial stations retain the right to elect between must-carry and retransmission consent within their market.

### C. Must-Carry/Retransmission Consent Election and Implementation

93. Section 325(b)(3)(B) provides that television stations must make an election between must-carry and retransmission consent "within one year after the date of enactment" and every three years thereafter. In the *Report and Order* we established the implementation of these provisions indicating that the initial election for must-carry or retransmission consent must be made by June 17, 1993.[265] We also provided that subsequent elections must be made by October 1, 1996, October 1, 1999, etc., and would become effective on January 1, 1997, January 1, 2000, etc.[266] We determined that broadcasters were to send copies of their election to the cable operator and were to retain copies of such elections in their public files.[267] We failed,

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255 8 FCC Rcd at 2999.
256 Newhouse Petition at 2.
257 Senate Report at 37. The House Report does not discuss retransmission consent because the provision was not included in the House-passed bill.
258 Yankee Petition at 5-6.
259 *See* Section 623(b)(7)(A)(iii); 47 U.S.C. § 543(b)(7)(A)(iii).
260 NCTA Petition at 24.
261 WSBK Comments at 2.
262 17 U.S.C. § 119(d).
263 Tribune Petition at 2-3; INTV Petition at 10; Chris-Craft Comments at 1, 2-4; WSBK Comments at 3-4; Turner Petition.
264 Time Warner Opposition at 15.
265 8 FCC Rcd 3001-3002.
266 *Id.* at 3002; 47 C.F.R § 76.64(f)(1).
267 *Id.* at 3003; 47 C.F.R. § 76.64(h).

however, to instruct television broadcast stations on the term of retention. Consistent with the requirements of the 1992 Cable Act and other record keeping provisions of Sections 73.3526 and 73.3527 of our rules, we will require television broadcast stations to retain election statements in their public files for the term of the three year-election period applicable to such election statements.[268]

94. In the *Report and Order* we noted that no party had commented on our proposal to require a new television station to make an initial must-carry/retransmission consent election within 30 days from the date that it commences regular broadcasts. We adopted that proposal, as well as an effective date of ninety (90) days following the election. In considering this provision further, we believe that such an election schedule could have a detrimental effect on a new television station which is entering the market. The Commission's rules provide that a television station which has completed construction may commence program tests prior to filing for a license with the Commission. These stations generally know in advance the date they plan to commence broadcasting. On our own motion, we therefore alter the initial election and effective date with respect to new television broadcast stations. A new television station shall elect between must-carry and retransmission consent sixty (60) days prior to commencing program tests, and shall notify the cable operator of that election. In the event that must-carry status is elected, the new station shall also include its channel position in the election statement to the cable operator. The election statement should be sent to the cable operator by certified mail, return receipt requested. The initial election of the broadcast station shall take effect ninety (90) days after it is made. This will provide the cable operator with sufficient time to notify subscribers of any change which may be required in the channel line-up of the system. The result will be that a new television broadcast station will have the opportunity to be carried on a cable system 30 days after it commences broadcasts over-the-air. We believe that such a result serves the public interest and provides new broadcast stations with appropriate access to enable them to effectively enter a market. Section 76.64(f)(4) of our rules is being revised to reflect this change.

95. In the *Report and Order* we failed to provide for the introduction of a new cable system in a market. Consistent with the purpose of the 1992 Cable Act, a new cable system will be required to notify all local commercial and noncommercial broadcast stations of its intent to commence service. The cable operator must send such notification, by certified mail, at least 60 days prior to commencing cable service. Commercial broadcast stations must notify the cable system within 30 days of the receipt of such notice of their election of either must-carry or retransmission consent with respect to such new cable system. If the commercial broadcast station elects must-carry, it must also indicate its channel position in its election statement to the cable system. Such election shall remain valid for the remainder of any three-year election interval, as established in section 76.64(f)(2). Noncommercial educational broadcast stations should notify the cable operator of their request for carriage and their channel position. The cable system must determine, in advance of commencing service on the system, whether a station is delivering a good quality signal and/or if a station will be required to indemnify for copyright purposes. The cable system must notify the broadcaster of any signal quality problems or copyright liability and must receive the station's response to such information prior to commencing carriage of the station's signal. These provisions are being added to our rules as Section 776.64(l).

**D. Retransmission Consent and Section 614**

96. In the *Report and Order* we rejected the tentative conclusion of the *Notice* that cable operators could negotiate with broadcasters to carry less than the entire program schedule of a retransmission consent station. We interpreted Section 614(b)(3)(B) and the legislative history as not permitting negotiation for carriage of partial broadcast signals. On October 5, 1993, at the request of various parties to this proceeding, we stayed the rule requiring carriage in the entirety for retransmission consent signals.[269] We stated in the *Stay Order* that we would resolve this issue in this *Memorandum Opinion and Order*.[270]

97. NCTA, Newhouse, Columbia International ("Columbia") and Continental Cablevision of Western New England ("CCWNE") request reconsideration of the requirement for carriage in the entirety with respect to retransmission consent signals.[271] NCTA argues that the plain language of the 1992 Cable Act states that the provisions of Section 614, including the carriage in the entirety provision, do not apply to stations which elect retransmission consent pursuant to Section 325.[272] Newhouse specifically urges that we reconsider the carriage in the entirety requirement to permit the grant of consent for those programs for which a broadcaster possesses the requisite authority.[273] Newhouse notes that the Commission tentatively concluded in the *Notice* that cable operators can

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[268] We will amend Sections 73.3526 and 73.3527 to indicate not only the need to include such information in the station's public file, but also the three-year retention period for such election statement.

[269] 8 FCC Rcd at 3003-04.

[270] 9 FCC Rcd 2681. Section 76.62(a) of the rules requires the carriage of the entire program schedule of any television station carried by a cable system. The rule applies to stations carried pursuant to Sections 614, 615 or 325. The only exception to this "carriage in its entirety" requirement is specific programming that is prohibited under Section 76.67 (sports blackout rule) or subpart F of Part 76 of our rules (network nonduplication and syndicated exclusivity). In the *Stay Order* we granted a stay, with respect to stations carried pursuant to Section 325 (retransmission consent stations), of the new Section 76.62(a). The stay was issued in response to a request by Media-Com, the licensee of a low power television station located in Akron, Ohio. Media-Com requested a waiver of the provision to permit it to continue part-time carriage on a Warner Cable system under a private agreement. We granted the stay in an effort to avoid an interim loss to the public of its present cable access while we considered petitions for reconsideration with respect to the carriage in the entirety issue.

[271] NCTA Petition at 16-20; Newhouse Petition at 4-8; Columbia Petition at 1-3; CCWNE Reply at 1-3. Media-Com filed comments in support of this request. Media-Com Comments at 1.

[272] NCTA Petition at 18; *see also* Section 325(b)(4); 47 U.S.C. § 325(b)(4).

[273] Newhouse Petition at 7 n.4. We note that Cox Cable Communications and Post-Newsweek Cable, Inc. support partial carriage based on existing partial carriage arrangements which have benefitted their systems. *See* Cox Cable Supplemental Comments; Post-Newsweek Cable Supplemental Comments.

contract with broadcasters to carry less than the entirety of the program schedule of retransmission consent stations.[274] Newhouse contends that Section 325(b) gives an entirely new right to broadcasters which has nothing to do with must-carry and that there is no apparent public policy which mandates carriage in the entirety for retransmission consent signals. Newhouse asserts that retransmission consent is supposed to be the result of a voluntary bargain between the cable operator and the broadcaster and that "[t]o put constraints on retransmission consent without any clear statutory guidance is an arbitrary decision which does not serve the public policy which retransmission consent itself was designed to implement."[275] Newhouse agrees with the Commission's conclusion in the *Report and Order* that Congress made a clear distinction between television stations' rights in their signal and copyright holders' rights in the programming carried on that signal, and notes that the Commission stated that it intended to maintain that distinction.[276] Newhouse maintains that the Commission "engaged in an unfathomable leap of logic that the bargaining over retransmission consent rights must be for the entire signal since a station cannot bargain over the retransmission rights to individual programs."[277]

98. Columbia and CCWNE request, in the alternative, that the prohibition on partial carriage agreements not be enforced retroactively to existing agreements (*i.e.*, that they be grandfathered), or that the Commission entertain petitions for special relief or waivers to preserve the public interest benefits which agreements such as these provide.[278]

99. NCTA points out that Section 614 addresses only the carriage of local broadcast signals and therefore, even if applied to signals carried pursuant to Section 325, the requirement would not extend to distant, non-local, broadcast signals. NCTA explains that, under the current regulatory scheme, a cable system is unable to fill the void left by a network affiliate which has not cleared network programming in the local market, because the cable system is now prohibited from purchasing the programming from a distant affiliate. Both NCTA and Newhouse point to the prior provisions of our rules and 17 U.S.C. Section 111(f) of the copyright laws which specifically provide that a cable operator may purchase from a distant station a network program which has not been cleared by the local affiliate.[279] The copyright laws provide that the system need not pay additional royalties for distant programming which represents programming not cleared by a local affiliate.[280]

100. NAB and INTV oppose the request for a change in the carriage in the entirety rule.[281] NAB argues that this issue was correctly decided in the first instance and that all television broadcast signals must be carried in their entirety, regardless of whether the carriage is pursuant to Section 614, 615 or 325. In response to the concern expressed by NCTA and Newhouse regarding the inability to obtain network programming from distant affiliates, NAB states that Section 73.658 of our rules already provides a partial solution in that it allows another local (and presumably must-carry station) to carry that programming.[282] INTV indicates that full-time carriage provides broadcasters with necessary bargaining power against cable systems whose bargaining power in retransmission consent negotiations is much stronger.[283] Neither NAB nor INTV address the issues raised by Columbia and CCWNE with respect to the public interest benefits garnered by private agreements to provide local news and information through pre-existing partial carriage agreements.

101. First, we continue to believe that, with respect to stations which have elected must-carry status, Section 614(b)(3) requires cable operators to "carry the entirety of the program schedule of any television station carried on the cable system . . . ." As discussed in the *Report and Order*, the legislative history indicates that carriage in the entirety was intended for those local commercial broadcast signals entitled to must-carry status under Section 614. Indeed, the legislative history is replete with discussions relating to the must-carry provisions, the need for adequate carriage of local broadcast stations on cable systems and the controlling market power of cable systems. Congress was concerned that such market power not overwhelm the ability of local broadcast stations to obtain carriage, and that the terms of carriage not be unreasonable.[284] Congress

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[274] Newhouse Petition at 5.

[275] Newhouse Petition at 6.

[276] Newhouse Petition at 5 (citing 8 FCC Rcd at 3004-3005).

[277] Newhouse Petition at 6.

[278] Columbia Petition at 4-6; CCWNE Petition at 4. Columbia and CCWNE have situations similar to that of Media-Com. Columbia operates a cable system which serves portions of Clark County, Washington, including the cities of Vancouver, Washington, and Portland, Oregon. Through a private agreement with stations located in Seattle and Tacoma, Washington, Columbia provides Washington residents with local news and programming, which is unavailable through other sources. The Washington residents served by Columbia's system are separated from the rest of the state by the Cascade Mountain Range, and hence, do not receive over-that-air signals from either Seattle or Tacoma. However, through the combined programming of both stations on one channel, Columbia is able to provide Washington residents with news and information of specific concern to those subscribers. Columbia states that it does not have the channel capacity to carry the full signal of both stations, and would be prohibited from doing so under the network nonduplication and syndicated exclusivity rights which those stations possess. Similarly, CCWNE, through private agreement with two Boston, Massachusetts stations, provides news from the state capital to its subscribers. CCWNE states that it carries only locally-produced programming from these two stations on its own "community" programming channel. CCWNE states that it cannot carry the signals in their entirety because the copyright royalty fees would be prohibitive, and even if affordable, it would still be prohibited from doing so under the network non-duplication and program exclusivity rules.

[279] NCTA Petition at 19-20; Newhouse Petition at 6-7.

[280] 17 U.S.C. § 111(f).

[281] NAB Opposition at 8; INTV Opposition at 6.

[282] NAB Opposition at 8-9. Section 73.658 prohibits anticompetitive behavior by network affiliates and provides that a non-affiliate station should be permitted to purchase network programming which the local affiliate has rejected. *See* 46 C.F.R. § 76.658.

[283] INTV Opposition at 6.

[284] The Conference Report states that "the must-carry and channel positioning provisions in the bill are the only means to protect the federal system of television allocations, and to promote competition in local markets . . . . Given the current economic condition of free, local over-the-air broadcasting, an affirmative must-carry requirement is the only effective mechanism to promote the overall public interest." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. ("Conference Report") at 75. *See also* Senate Report at 41-46; House Report at 47-58.

indicated its strong belief that absent the must-carry provisions, local broadcast stations would not be readily available to cable subscribers. In the Senate Report, Congress stated that "it is for this reason that the legislation incorporates a special provision focusing just on the carriage of local broadcast signals. Moreover, this provision addresses both the primary concern of carriage and the secondary concerns of the terms of carriage.[285] Based on these concerns, we believe that all qualified local commercial broadcast stations should have the minimal protection afforded by Section 614. Further, we also continue to believe that any broadcast station that is eligible for must-carry status, although it may be carried pursuant to a retransmission consent agreement must, therefore, be carried in the entirety, unless carriage of specific programming is prohibited, pursuant to our rules relating to network nonduplication, syndicated exclusivity, sports programming or similar regulations."

102. The *Report and Order* concluded that Section 614(b)(3) requires carriage in the entirety of any broadcast station carried on the cable system. However, upon reconsideration, we believe that the ability of a broadcaster and cable system to negotiate and agree to carriage of less than the entire signal is permitted only where Section 614 is inapplicable. Specifically, as pointed out by NCTA, Section 614 applies only to qualified local commercial television signals (including qualified LPTV stations), and does not apply to either non-local or non-qualified local commercial broadcast signals. Therefore, where the broadcaster's signal is not eligible for must-carry rights, either by failure to meet the requisite definitions or because the broadcast station is outside the local market (ADI), and where, therefore Section 614 is inapplicable, the broadcaster's rights to freely negotiate for the carriage of that signal pursuant to retransmission consent includes the right to negotiate for partial carriage of the signal.

103. Section 325 states that no cable system or other multichannel video programming distributor shall without consent retransmit "the signal of a broadcasting station, *or any part thereof*, . . ."[286] In contrast, Section 614(b)(3)(B), the must-carry provision, states that the cable operator shall carry "the entirety of the program schedule . . . ." Further, Section 325(b)(4) states that if a station elects retransmission consent, "the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system." While, at first blush, the statutory language appears to permit broadcasters to negotiate with cable operators for retransmission consent for any part of their signal (*i.e.*, any programs), we now believe that a more correct and harmonious reading of Section 614 and 325 together leads to an interpretation that Congress intended cable systems to carry all the programming of must-carry eligible stations regardless of whether the broadcast station opts for must-carry status or not. While it is clear under Section 325 that some negotiated partial carriage is permitted, Section 325 does not mandate the availability of partial carriage in all negotiations. Given this fact, and the congressional emphasis on full carriage for must-carry qualified stations (discussed above), we believe the statutory provisions read in concert suggest that qualified must-carry stations should, as a matter of policy, be carried in their entirety even if they are carried pursuant to retransmission consent.

104. This interpretation is bolstered by Congress' direction to the Commission in Section 325(b)(3)(A) to fashion "regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614." By including this provision in Section 325, we believe that Congress recognized the interplay between the two sections and gave the Commission authority to fill in regulatory gaps.[287] Thus, at the very least, the Commission has the flexibility to require carriage in the entirety for qualified must carry stations carried pursuant to retransmission consent to ensure that the basic underlying objectives of the 1992 Cable Act relating to local broadcast service would be fulfilled. Otherwise, the statutory goals at the heart of Sections 614 and 325 -- to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public -- could easily be undermined.

105. The Senate Report confirms this interpretation by stating that the "rights granted to stations under section 325 and under sections 614 and 615 can be exercised harmoniously, and it anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise."[288] We believe that our rules should provide the widest possible range of opportunity for both broadcast stations and cable operators, where the must-carry provisions are not applicable. Thus, any station which is eligible for must-carry status must be carried, if at all, in its entirety regardless of whether the station elects must-carry or retransmission consent. Similarly, any station which is not eligible for must-carry status under Section 614, because it is not a local commercial broadcast station, or does not qualify under the definitions of Section 614, may negotiate for partial carriage. Thus, we conclude, based upon a reading of both Sections 614 and 325, that broadcast stations whose signals are entitled to must-carry but are instead carried pursuant to retransmission consent are not permitted to negotiate for carriage of less than their entire signal.[289]

106. The 1992 Cable Act was specific in stating that "[c]able systems carrying the signals of broadcast stations, whether pursuant to an agreement with the station or pursuant to the provisions of [must-carry], will continue to have the authority to retransmit the programs carried on those signals under the section 111 compulsory license."[290] The Committee emphasized that nothing in the 1992 Cable Act was "intended to abrogate or alter existing program licensing agreements between broadcaster and program suppliers, or to limit the terms of existing or future licensing agreements."[291]

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285 Senate Report at 45.A

286 47 U.S.C. § 325(b)(1) (emphasis added).

287 *Cf. Chisholm v. FCC*, 538 F.2d 349, 357 (D.C. Cir. 1976).

288 Senate Report at 38.

289 We note that this interpretation of the statute is supported by the legislative history which notes that the retransmission consent provision was drafted in such a way as to promote the "established relationships between broadcasters andh) cable systems," and to "minimize unnecessary disruption to broadcasters and cable operators." Senate Report at 36.

290 47 U.S.C. § 325(b)(6).

291 Senate Report at 36.

107. We continue to interpret retransmission consent as a new right given to the broadcaster under the terms of the 1992 Cable Act and as a right separate from the right of the underlying copyright holder[292] and do not believe that our reconsideration decision in any way undermines the separate nature of these rights or creates a conflict between communications and copyright based policies. Congress indicated that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals."[293] As stated in the *Report and Order*, the right involved is one which may be freely bargained away in future programming contracts.[294] Although NAB and INTV argue that carriage in the entirety is required to ensure the continued validity of both the retransmission consent right and the current compulsory copyright, we do not see how providing broadcasters and cable operators with additional flexibility to negotiate retransmission agreements for signals not eligible for must-carry status alters the nature of the rights granted under Sections 325 and 614 in any way. Indeed, according this additional flexibility is consistent with interpreting the right in question as a new right subject to the control of the station licensee. To the extent these rights have been bargained away, the remaining rights that have not been disposed of still remain under the control of the station involved. As noted in paragraph 99, a contrary interpretation would not only deprive broadcasters and cable operators of the ability to negotiate mutually advantageous arrangements for the carriage of portions of distant signals but would negate the functioning of various portions of Section 111 of the Copyright Act and of the Commission's rules which specifically contemplate the possibility that portions of distant signals may be carried.[295] Accordingly, we interpret Section 325 to provide that broadcasters may bargain with cable operators for the right to carriage of any part of the broadcast signal provided that such station is not eligible under the provisions of Section 614, either because it is not a local commercial broadcast signal or it does not qualify for mandatory carriage. "Carriage in the entirety" remains a requirement with respect to signals eligible for mandatory carriage under the provisions of Section 614. Sections 76.62(a) and 76.64(k) are being revised to reflect this change.

**E. Retransmission Consent Contracts**

108. In the *Report and Order* we specifically prohibited exclusive retransmission consent agreements between television broadcast stations and cable operators.[296] This provision forbids a television station from making an agreement with one MVPD for carriage, exclusive of other MVPDs. After reviewing the comments filed in response to the *Notice*,[297] we concluded that this prohibition is necessary in light of the concerns that led Congress to regulate program access and cable signal carriage agreements.[298] We then stated that we would revisit the issue in three years.

109. NCTA argues in its petition for reconsideration that prohibiting exclusive retransmission consent agreements is not warranted and is not supported by the 1992 Cable Act. NCTA claims that such a provision is "contrary to the Commission's belief that broadcasters should be entitled to obtain and enforce exclusivity, in the form of network non-duplication and syndex, *against* cable operators -- even if they have opted for retransmission consent."[299] NCTA also states that the prohibition is not necessary under the program access provisions of the 1992 Cable Act and that such agreements may be justified based on a public interest showing. In addition, NCTA claims that exclusive contracts between operators and program suppliers, such as any of the networks, are not within the scope of the Section 19 prohibitions. Therefore, NCTA argues that we should not uphold the ban on exclusive retransmission consent agreements.

110. WCA, Bell Atlantic and U.S. Telephone Association ("USTA") oppose the request filed by NCTA to reconsider this issue and request that we continue to prohibit such agreements. WCA notes that we did not suggest that the 1992 Cable Act requires the prohibition of such contracts, but simply that such a prohibition would further the purposes of the statute. WCA points out that Congress expressly provided that the Commission ensure that provisions adopted do not conflict with our obligation to ensure that rates are reasonable. Moreover, WCA points to the legislative history and the stated purpose to promote competition in the multichannel video marketplace.[300] Bell Atlantic states that such a prohibition is within our authority to establish regulations to govern the exercise of retransmission consent, and that such a provision will promote competition and further congressional intent.[301] We do not believe that NCTA has raised a credible argument for revisiting this issue at this time. We are adding a new subsection (m) to Section 76.64 of our rules to reflect this decision. As we indicated in the *Report and Order*, we will consider the need for such a prohibition against exclusive retransmission consent agreements in three years.

**F. Other Matters**

111. *Retransmission Consent and Network Nonduplication Protection.* In the *Report and Order*, we concluded that local television stations electing retransmission consent should continue to be entitled to invoke network nonduplication or syndicated exclusivity protection, whether or not they are carried by the cable system.[302] Commenters had sought to eliminate exclusivity rights for stations choosing retransmission consent.[303] We found,

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[292] 8 FCC Rcd at 3004.

[293] Senate Report at 36.

[294] *Id.*

[295] *See e.g.*, 17 U.S.C. Section 111(f)(providing for the carriage of network programs uncleared in the cable operator's market); 47 C.F.R. § 76. 161 (providing for programs to be carried in place of programs deleted under the syndicated exclusivity rules).

[296] 8 FCC Rcd at 3006.

[297] *See* WCA Comments at pages 19-24; National Private Cable Association at pages 6-13; U.S. Telephone Association at 2-6; Bell Atlantic at 1-2; and InterMedia Partners at 13-14. In particular, WCA points to the comments of InterMedia, one of the nation's larger cable systems, which joined its competitors in urging the prohibition of exclusive retransmission consent contracts of this nature.

[298] *See 1st Report and Order* , MM Docket 92-265, 8 FCC Rcd 3359 (1993) (Program Access).

[299] NCTA Petition at 22-23.

[300] WCA Opposition at 6 (citing Senate Report at 18).

[301] Bell Atlantic Opposition at 2.

[302] 8 FCC Rcd at 3006.

[303] *See* Petition for Rulemaking of the National Cable Television Association, Inc., filed January 19, 1993; *see also* Opposi-

however, that the legislative history addressed this matter and that Congress intended for exclusivity protection to apply under its regulatory framework.[304]

112. Cable interests contend that stations electing retransmission consent should not be entitled to network nonduplication protection.[305] NCTA and Cablevision claim that the application of network nonduplication rights in conjunction with retransmission consent could result in the loss of network programming for cable subscribers. They observe that where a station and a cable operator cannot reach a retransmission consent agreement, the station can still assert its exclusivity rights against another network affiliate that agrees to carriage. The result, according to petitioners, will be that subscribers will be precluded from receiving any network programming. Petitioners also argue that the 1992 Cable Act does not require the Commission to retain this rule and, indeed, the result is contrary to the intent of the Act, which sought to provide consumers with access to the widest diversity of programming, including network programming.[306] Moreover, cable interests argue that retaining network nonduplication rights for stations electing retransmission consent provides broadcasters with an advantage over cable operators in their consent negotiations. They assert that they will have to accede to broadcasters' demands since the local station will be able to prevent them from providing network programming to their subscribers from distant stations.

113. Broadcasting interests support the Commission's decision to continue to permit stations choosing retransmission consent to enforce their nonduplication rights.[307] They assert that petitioners are simply rearguing issues rejected by the Commission in the *Report and Order*. NAB and NASA contend that the elimination of network nonduplication protection for stations choosing retransmission consent would undermine localism and the ability of networks to distribute their programming. In particular, NASA states that Congress determined that the long term survival of the over-the-air local broadcast system could be assured by providing broadcasters with the right to control the distribution of their signals and the concomitant right to be compensated for the retransmission of those signals. Cap Cities argues that cable operators have an unfair advantage in the negotiating process since they face virtually no competition. It also argues that, without exclusivity protection, broadcasters would be forced to choose the must-carry option since the cable operator would be able to import a distant station rather than negotiate with a station licensed to serve its local area. Finally, Cap Cities states that it is unreasonable to eliminate this regulatory structure which promotes local broadcasting and the network/affiliate distribution system based on predictions regarding negotiations that had not yet taken place.[308]

114. We affirm our decision to allow stations electing retransmission consent to assert network nonduplication or syndicated exclusivity protection as provided in the rules.[309] We observe that this issue was considered earlier in this proceeding in response to a petition from NCTA, which we denied in the *Report and Order*. Parties have provided no new arguments nor additional evidence to convince us that our decision conflicts with the intent of Congress. We also do not find that there is a conflict between retransmission consent rights and exclusivity rights. Network nonduplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.[310]

115. We also note that cable operators believe that broadcasters have an advantage in the negotiations for retransmission agreements due to their ability to assert their exclusivity rights, while broadcasters believe the reverse. Local broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals. Thus, we believe that there are incentives for both parties to come to mutually-beneficial arrangements. Moreover, the allegations that local stations electing retransmission consent would not be carried due to their inability to successfully negotiate agreements with cable operators and then assert their exclusivity rights and deprive subscribers of programming was speculative at the time the reconsideration petitions were filed. Now that the retransmission consent provisions are in effect, there is no evidence that subscribers are being deprived of network programming. We note that there are only limited situations where local stations are not carried.[311] Therefore, the dire consequences predicted do not exist and we continue to believe that stations should receive the exclusivity protection to which they are entitled.

## IV. ADMINISTRATIVE MATTERS

### Regulatory Flexibility Analysis

116. Pursuant to the Regulatory Flexibility Act of 1980, the Commission included a final analysis in the *Report and Order* detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in

tion to Petition for Rulemaking of the National Cable Television Association, Inc. to Revise the Network Non-duplication Rules, filed February 8, 1993.

304 Senate Report at 38.

305 NCTA Petition at 20-22; Cablevision Systems Corporation Petition at 1-9; Time Warner Reply at 3-4.

306 1992 Cable Act, Sections 2(b)(1) and (3).

307 NAB Opposition at 6-8; Cap Cities Opposition at 1-7; NASA Opposition at 1-5.

308 Cap Cities Opposition at 2-3.

309 We note that we also considered whether to modify the geographic zone applicable to exclusivity protection to make it consistent with the definition of a local television market as the ADI, as specified in the 1992 Cable Act. We declined to make such a change. *See* 8 FCC Rcd at 2978-2979.

310 1992 Cable Act, Section 2(a)(12).

311 A joint survey conducted by NAB and the Television Bureau of Advertising on October 6, 1993, the effective date of the retransmission consent provisions, indicates that 92% of all television stations reach virtually all cable households in their ADIs and 97% of all stations reach at least 90% of such homes. *See* TVB News , Television Bureau of Advertising, Inc., October 7, 1993.

response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. No substantive changes have occurred pertaining to the final analysis as a result of the petitions for reconsideration.

**Paperwork Reduction Act**

117. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

## ORDERING CLAUSES

118. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 4(i) and (j), and 303 of the Communications Act of 1934, as amended. and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Parts 73 and 76 of the Commission Rules, 47 C.F.R. Part 73 and 76, are AMENDED as set forth in Appendix B.

119. IT IS FURTHER ORDERED that rule provisions of Part 76 of the rules set forth in Appendix B shall be effective 30 days after publication in the Federal Register. Rule provisions of Part 73 of the rules set forth in Appendix B shall be effective upon approval from OMB.

120. IT IS FURTHER ORDERED that Sections 76.62 and 76.64 of the Commission's rules which were stayed by *Order* of the Commission on October 5, 1994 are revised as indicated in Appendix B and the *Stay Order* is lifted as of the effective date of these rules.

121. IT IS FURTHER ORDERED that the petitions for reconsideration filed by the parties listed in Appendix A are GRANTED IN PART and DENIED IN PART only to the extent indicated in this *Memorandum Opinion and Order*, except that the Petition for Reconsideration filed by Western Broadcasting of Puerto Rico is DISMISSED without prejudice.

**Additional Information**

122. For further information on this proceeding, contact Elizabeth Beaty or Meryl S. Icove, Cable Services Bureau, (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

**Petitions for Reconsideration**

1. A.C. Nielsen Company
2. Anchor Media
3. Association of Independent Television Stations
4. Cablevision Systems Corporation
5. Colorado Christian University
6. Columbia International
7. Community Antenna Television Association
8. Cypress Broadcasting, Inc.
9. Moran Communications
10. National Association of Broadcasters
11. National Cable Television Association
12. Newhouse Broadcasting
13. Outlet Broadcasting Company
14. Press Broadcasting Company
15. Star Cable Associates
16. Tribune Broadcasting Company
17. WBNS-TV, Columbus, Ohio
18. Western Broadcasting Corporation of Puerto Rico
19. Wireless Cable Association International
20. WTTE, Columbus, Ohio
21. Yankee Microwave

**Comments in Support of Petitions for Reconsideration**

1. Chris-Craft Industries, Inc.
2. Community Broadcasts Association
3. Cox Cable Communications, Inc.*
4. Media-Com Television, Inc.
5. Midwest KAAL Corp.
6. Post-Newsweek Cable, Inc.*
7. StarSight, Inc.*
8. Turner Broadcasting System, Inc.
9. WSBK License, Inc.

**Oppositions to Petitions for Reconsideration**

1. Bell Atlantic Telephone Companies
2. Capital Cities/ABC, Inc.
3. Granite Broadcasting Corporation
4. National Association of Broadcasters
5. National Cable Television Association
6. Network Affiliated Stations Alliance
7. San Jacinto Television Corporation (KTFH-TV)
8. Time Warner Entertainment Company, LP
9. United States Telephone Association
10. United Video, Inc.
11. Wireless Cable Association International

* Indicates late filed.

**Replies to Oppositions for Reconsideration**

1. A.C. Nielsen Company
2. Association of Independent Television Stations
3. Colorado Christian University
4. Continental Cablevision of Western New England
5. Cypress Broadcasting, Inc.
6. National Association of Broadcasters
7. Time Warner Entertainment Company, LP
8. Tribune Broadcasting Company

## APPENDIX B

**Rules**

Part 73 of Chapter I of Title 47 of the Code of Federal Regulation is amended as follows:

**Part 73 BROADCAST RADIO SERVICES**

1. The Authority Citation for Part 73 is revised to read as follows:

**AUTHORITY: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. § 154, as amended.**

2. Section 73.3526 is amended by adding paragraph (g) to read as follows:

**73.3526 Local public inspection file of commercial stations.**

*****

(g) Statements of a commercial television station's election with respect to either must-carry or retransmission consent as defined in section 76.64 of this chapter shall be retained in the public file of the television station for the duration of the three year election period to which the statement applies.

3. Section 73.3527 is amended by adding paragraph (g) to read as follows:

**73.3527 Local public inspection file of noncommercial educational stations.**

*****

(g) Noncommercial television stations requesting mandatory carriage on any cable system pursuant to Section 76.56 of this chapter shall place a copy of such request in its public file and shall retain both the request and relevant correspondence for the duration of any period to which the statement applies.

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 76 -- CABLE TELEVISION SERVICE**

1. The Authority Citation for Part 76 is revised to read as follows:

**AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460, 47 U.S.C. §532; Sec. 623, as amended, 106 Stat. 1460; 47 U.S.C. §§532, 533, 535, 543, 552.**

2. Section 76.7(c)((4)(i),(ii), and (iii) are revised and a new paragraph (c)(4)(iv) is added to read as follows:

**§ 76.7 Special relief and must-carry complaint procedures.**

*****

(c)***

(4)(i) Must-carry complaints filed pursuant to Sec. 76.61(a) (Complaints regarding carriage of local commercial television stations) shall be accompanied by the notice from the complainant to the cable television system operator (Sec. 76.61(a)(1)), and the cable television system operator's response (Sec. 76.61(a)(2)), if any. If no timely response was received, the complaint should so state.

(ii) Must-carry complaints filed pursuant to Sec. 76.61(b) (Complaints regarding carriage of qualified local NCE television stations) should be accompanied by any relevant correspondence between the complainant and the cable television system operator.

(iii) No must-carry complaint filed pursuant to Sec. 76.61(a)(complaints regarding local commercial television stations) will be accepted by the Commission if filed more than sixty (60) days after the date of the specific event described in this paragraph. Must-carry complaints filed pursuant to Sec. 876.61(a) should affirmatively state the specific event upon which the complaint is based, and shall establish that the complaint is being filed within sixty (60) days of such specific event. With respect to such must-carry complaints, the specific event shall be

(A) The denial by a cable television system operator of a request for carriage or channel position contained in the notice required by Sec. 76.61(a)(1), or

(B) The failure to respond to such notice within the time period allowed by Sec. 76.61(a)(2).

(iv) With respect to must-carry complaints filed pursuant to Sec. 76.61(b), such complaints may be filed at any time the complainant believes that the cable television system operator has failed to comply with the applicable provisions of subpart D of this part.

*****

3. Section 76.55(a)(2) is revised to read as follows:

**§ 76.55 Definitions applicable to the must-carry rules.**

*****

(a)***

(2) Is owned and operated by a municipality and transmits noncommercial programs for educational purposes, as defined in Section 73.621 of this chapter, for at least 50 percent of its broadcast week.

*****

4. Section 76.55 is amended by adding a note after paragraph (a)(3)(iii) to read as follows:

**76.55 Definitions applicable to the must-carry rules.**

*****

Note to paragraph (a): For the purposes of Section 76.55(a), "serving the franchise area" will be based on the predicted protected contour of the NCE translator.

*****

5. Section 76.55(b) is amended by adding paragraph (b)(3) to read as follows:

**Section 76.55 Definitions applicable to the must-carry rules.**

*****

(b)***

(3) Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection 76.56(a)(5), where such signal would be considered a distant signal for copyright purposes unless such station agrees to indemnify the cable operator for any increased copyright liability resulting from carriage of such signal on the cable system.

*****

6. Section 76.55(d) is amended by adding a note after paragraph (d)(6) to read as follows

**Section 76.55 Definitions applicable to the must-carry rules.**

*****

(d)***

(6)***

Note: For the purposes of this section, a good quality signal shall mean a signal level of either -45 dBm for UHF signals or -49 dBm for VHF signals at the input terminals of the signal processing equipment, or a baseband video signal.

*****

7. Section 76.55 is amended by revising the note following paragraph (e)(3) to read as follows:

**Section 76.55 Definitions applicable to the must-carry rules.**

*****

(e)***

(3)***

Note: For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the 1991-1992 *Television Market Guide* will apply.

*****

8. Section 76.56 is amended by revising paragraphs (a)(1)(iii), (a)(5) and (b)(1) to read as follows:

**§ 76.56 Signal carriage obligations.**

(a)***

(1)***

(iii) Systems with more than 36 usable activated channels shall be required to carry the signals of all qualified local NCE television stations requesting carriage, but in any event at least three such signals; however a cable system with more than 36 channels shall not be required to carry an additional qualified local NCE station whose programming substantially duplicates the programming of another qualified local NCE station being carried on the system.

*****

(5) Notwithstanding the requirements of paragraph (a)(1) of this section, all cable operators shall continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990. In the case of a cable system that is required to import a distance qualified NCE signal, and such system imported the signal of a qualified NCE station as of March 29, 1990, such cable system shall continue to import such signal until such time as a qualified local NCE signal is available to the cable system. This requirement may be waived with respect to a particular cable operator and a particular NCE station, upon the written consent of the cable operator and the station.

(b)***

(1) A cable system with 12 or fewer usable activated channels, as defined in Section 76.5(oo), shall carry the signals of at least three qualified local commercial television stations, except that if such system serves 300 or fewer subscribers it shall not be subject to these requirements as long as it does not delete from carriage the signal of a broadcast television station which was carried on that system on October 5, 1992.

*****

9. Section 76.57(a) is revised to read as follows:

**Section 76.57 Channel positioning.**

(a) At the election of the licensee of a local commercial broadcast television station, and for the purposes of this rule, a qualified low power television station, carried in fulfillment of the must-carry obligations, a cable operator shall carry such signal on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992.

*****

10. Section 76.60 is amended by adding a new paragraph (c) to read as follows:

**§ 76.60 Compensation for carriage.**

*****

(c) A cable operator may accept payments from stations pursuant to a retransmission consent agreement, even if such station will be counted towards the must-carry complement, as long as all other applicable rules are adhered to.

*****

11. Section 76.62(a) is revised to read as follows:

**§ 76.62 Manner of carriage.**

(a) Cable operators shall carry the entirety of the program schedule of any television station (including low power television stations) carried by the system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or Subpart F of Part 76, or unless carriage is pursuant to a valid retransmission consent agreement for the entire signal or any portion thereof as provided in Section 76.64.

*****

12. Section 76.64 is amended by revising paragraphs (b)(2), (e), (f)(4) and (k) and by adding paragraphs (l), (m) and (n) to read as follows:

**§76.64 Retransmission consent.**

*****

(b)***

(2) The multichannel video programming distributor obtains the signal of a superstation that is distributed by a satellite carrier and the originating station was a superstation on May 1, 1991, and the distribution is made only to areas outside the local market of the originating station; or

(e) The retransmission consent requirements of this section are not applicable to broadcast signals received by master antenna television facilities or by direct over-the-air reception in conjunction with the provision of service by a multichannel video program distributor provided that the multichannel video program distributor makes reception of such signals available without charge and at the subscribers option and provided further that the antenna facility used for the reception of such signals is under the control of the subscriber and is owned by or is available for purchase by the subscriber upon termination of service.

(f)***

(4) New television stations shall make their initial election any time between 60 days prior to commencing broadcast and 30 days after commencing broadcast; such initial election shall take effect 90 days after they are made.

*****

(k) Retransmission consent agreements between a broadcast station and a multichannel video programming distributor shall be in writing and shall specify the extent of the consent being granted, whether for the entire signal or any portion of the signal.

(l) A cable system commencing new operation is required to notify all local commercial and noncommercial broadcast stations of its intent to commence service. The cable operator must send such notification, by certified mail, at least 60 days prior to commencing cable service. Commercial broadcast stations must notify the cable system within 30 days of the receipt of such notice of their election for either must-carry or retransmission consent with respect to such new cable system. If the commercial broadcast station elects must-carry, it must also indicate its channel position in its election statement to the cable system. Such election shall remain valid for the remainder of any three-year election interval, as established in section 76.64(f)(2). Noncommercial educational broadcast stations should notify the cable operator of their request for carriage and their channel position. The new cable system must notify each station if its signal quality does not meet the standards for carriage and if any copyright liability would be incurred for the carriage of such signal. Pursuant to Section 76.57(e), a commercial broadcast station which fails to respond to such a notice shall be deemed to be a must-carry station for the remainder of the current three-year election period.

(m) Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make an agreement with one multichannel distributor for carriage, to the exclusion of other multichannel distributors.

(n) A multichannel video programming distributor providing an all-band FM radio broadcast service (a service that does not involve the individual processing of specific broadcast signals) shall obtain retransmission consents from all FM radio broadcast stations that are included on the service that have transmitters located within 92 kilometers (57 miles) of the receiving antenna for such service. Stations outside of this 92 kilometer (57 miles) radius shall be presumed not to be carried in an all-band reception mode but may affirmatively assert retransmission consent rights by providing 30 days advance notice to the distributor.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-142**

In re Applications of

ALGREG CELLULAR ENGINEERING File No. 10607-CL-P-307-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 - Franklin

CRANFORD CELLULAR COMMUNICATIONS File No. 10611-CL-P-311-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 311, Alabama 5 - Cleburne

NEW ERA CELLULAR TELE-COMMUNICATIONS File No. 10563-CL-P-332-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 332, Arkansas 9 - Polk

BAY CELLULAR OF FLORIDA File No. 10754-CL-P-497-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 497, Mississippi 5 - Washington

FLORIDA CELLULAR File No. 10445-CL-P-505-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 505, Missouri 2 - Harrison

A-1 CELLULAR COMMUNICATIONS File No. 10454-CL-P-514-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 514, Missouri 11 - Moniteau

BRAVO CELLULAR File No. 10673-CL-P-579-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 579, North Carolina 15 - Cabarrus

ALPHA CELLULAR File No. 10909-CL-P-586-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 586, Ohio 2 - Sandusky

CEL-TEL COMMUNICATIONS File No. 10912-CL-P-589-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 589, Ohio 5 - Hancock

EJM CELLULAR PARTNERS File No. 10567-CL-P-596-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 596, Oklahoma 1 - Cimarron

PINELLAS COMMUNICATIONS File No. 10808-CL-P-613-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 613, Pennsylvania 2 - McKean

CENTAUR PARTNERSHIP File No. 10720-CL-P-631-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 631, South Carolina 7 - Calhoun

SIGNAL CELLULAR COMMUNICATIONS File No. 10721-CL-P-632-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 632, South Carolina 8 - Hampton

A-1 CELLULAR COMMUNICATIONS File No. 10409-CL-P-661-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 661, Texas 10 - Navarro

EJM CELLULAR PARTNERS File No. 10116-CL-P-721-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721, Wyoming 4 - Niobrara

SATELLITE CELLULAR SYSTEMS File No. 10037-CL-P-318-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 318, Arizona 1 - Mohave, for Station KNKN 268

JAYBAR COMMUNICATIONS File No. 10042-CL-P-323-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323, Arizona 6 - Graham, for Station KNKN 251

DATA CELLULAR SYSTEMS File No. 10029-CL-P-345-A-88
File No. 07080-CL-MP-91

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 345, California 10 - Sierra, for Station KNKN 250

CELLULAR PACIFIC File No. 10031-CL-P-346-A-88
File No. 06606-CL-MP-90
File No. 06688-CL-MP-90

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 346, California 11 - El Dorado, for Station KNKN 252

NORTH AMERICAN CELLULAR File No. 10066-CL-P-388-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 388, Idaho 1 - Boundary, for Station KNKN 253

ALPHA CELLULAR File No. 10318-CL-P-410-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 - Brown, for Station KNKN 340

For assignment of File No. 04924-CL-AL-1-90
Station KNKN 340
in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 RSA

ALEE CELLULAR COMMUNICATIONS File No. 10074-CL-P-555-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 555, New Mexico 3 - Catron, for Station KNKN 271

CRYSTAL COMMUNICATIONS SYSTEMS File No. 10078-CL-P-606-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 606, Oregon 1, Clatsop, for Station KNKN 309

## MEMORANDUM OPINION AND ORDER

**Adopted: November 7, 1994; Released: November 17, 1994**

By the Review Board: MARINO (Chairman) and GREENE.

1. Our *Decision*, 9 FCC Rcd 5098 (Rev. Bd. 1994), in this proceeding: (1) dismissed fifteen Rural Service Area (RSA) cellular applications selected by lottery as defective pursuant to 47 CFR § 22.20 in light of specific findings of rule violations supported by a very substantial factual record; and (2) revoked the RSA licenses of eight parties also selected by lottery because the licensees' principals knowingly participated in an impermissible agreement to maximize their chances of winning the lotteries and cooperated in efforts to conceal information about the agreement from the Commission and their competitors. Now before the Review Board are three petitions filed by Algreg Cellular Engineering (Algreg), Satellite Cellular Systems (Satellite), and Crystal Communications Systems (Crystal) for reconsideration of that *Decision*, and timely responsive pleadings. We shall deny all three petitions for the reasons set out below.

**Algreg.**

2. Algreg, an applicant, renews a procedural argument previously made in its exceptions that it was denied the right to a full hearing by the ALJ's refusal to permit it to conduct redirect examination of Gregory Neely, Algreg's sole principal. In denying the exception (see ¶ 58 of *Decision)*, we recited that the ALJ had denied Algreg's request due to counsel's failure to reserve time for redirect at the appropriate juncture. We concluded that Algreg had shown neither abuse of discretion in the ALJ's ruling nor any prejudice resulting therefrom. *Id.* Algreg argues now, however, that we relied on an erroneous and faulty premise in rejecting the exception because the ALJ never established specific procedures for redirect examination of witnesses. Algreg charges that the ALJ's denial of redirect changed the whole tenor of the proceeding, leading "both the ALJ and the Board to incorrectly deem Neely and others as defrauders of the Commission, to misconstrue legitimate motives to keep the [agreement] quiet as long as ... advised ... to do so, and therefore to misjudge the [a]pplicants and [l]icensees as reprehensible human beings." Pet. at 10. It further adverts to various arguments, purportedly mitigating the applicants' and licensees' actions faulted by the ALJ and the Board, that it would have been able to demonstrate had it been permitted redirect of Neely. *Id.* at 8-9.

3. Algreg has shown no basis for reconsidering our *Decision* because Algreg has not shown that it was prejudiced by the ruling or that the testimony it would have presented on redirect bore significantly on our fact-finding and drawing of conclusions. *See generally Cellular Mobile Systems of Pennsylvania v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985); *Deep South Broadcasting Co. v. FCC*, 347 F.2d 459, 463 (D.C. Cir. 1965). Initially, we perceive no basis for Algreg's assertion that the absence of redirect examination seriously influenced the tone of the proceeding. The sole area of surprise claimed by Algreg is that Neely was subjected to examination about a Federal Trade Commission proceeding that had been directed against certain cellular lottery application preparers. Contrary to Algreg's assertion that the investigation "inflame[d]" the Board, however, *see* Reply Brief at 4, the Board merely alluded to the FTC investigation in passing (*Decision* at ¶ 10) and did not rely on it in dismissing the applications or revoking the licenses. Additionally, the bulk of the matters that Algreg contends it could have established on redirect, *see* Algreg Pet. at 8, pertain to legal arguments that could have been included in proposed findings and exceptions rather than factual material known to Neely that might have been developed by Neely's testimony. The remaining point that Algreg sought to prove, in essence, relates to Neely's intent concerning the rule violations. *See* Pet. at 9. Intent to violate the rules, however, was not relevant to Algreg's application dismissal, because the rules call for an objective evaluation of the application to determine its acceptability. Algreg's application was dismissed as defective for noncompliance with the rules barring multiple ownership interests in competing applications, pursuant to 47 CFR § 22.20 (application not in compliance with Commission rules will be unacceptable for filing and returned to applicant). *See* ¶ 51 of *Decision*. In sum, we need not decide whether the ALJ erred in denying redirect examination of Neely because, even if the ALJ abused his discretion by holding Algreg to an unclear procedural requirement, any error that may have occurred was harmless and would not necessitate a remand. *See Sahara Coal Co. v. OWCP, U.S. Dept. of Labor*, 946 F.2d 554, 558 (7th Cir. 1991) ("[i]f the outcome of a remand is foreordained, we need not order one").

**Satellite.**

4. Satellite, a licensee, seeks reconsideration of our finding that it had entered into and was a party to the Mutual Contingent Risk-Sharing Agreement (MCRSA). It was the licensees' participation in, and concealment of, the MCRSA that led the Board to affirm the license revocations. The Board, at ¶ 61 of the *Decision*, incorporating a discussion found at ¶ ¶ 42-48, rejected contentions premised on state law defenses that the parties had not entered into the MCRSA. The thirteen applicants and eight licensees had all argued that we must apply the respective contract and partnership law of the various jurisdictions (*i.e.*, California, Florida, New Jersey, Texas, and the District of Columbia) to determine whether they were "bound" by the MCRSA. Additionally, at ¶ ¶ 62 and 66 of the *Decision*, we adopted the pertinent paragraphs of the *Initial Decision*, without repeating the ALJ's extensive factual findings relative to each licensee, that all of the licensees, including Satellite, each discussed, understood, and favored the MCRSA, and willingly entered into the MCRSA by registering their votes approving participation in the MCRSA and signing the execution document binding them to its terms and conditions. Satellite, like the other licensees, reported the existence of, and its participation in, the MCRSA to the Commission after the MCRSA had become public, and submitted a copy of an agreement to rescind the MCRSA. AALA/CFL Exhs. 345, 346.

5. In its instant petition, Satellite argues that, even if the Board is correct that state law is irrelevant, the facts fail to show that it joined the MCRSA. Specifically, although it concedes that its authorized signing partner, Betty Thompson, signed the execution document, Satellite argues that Thompson signed what she thought was only a draft of the MCRSA to be submitted to "someone" at the Commission for approval, and that she signed as an individual, not on behalf of the partnership. Pet. at 4. It asserts Thompson believed that by signing the document, she was affirming as an individual partner of Satellite that she was personally

interested in the concept of the MCRSA. Satellite contends that its disclosure and rescission of the MCRSA is not evidence that it entered into the MCRSA because counsel, then newly retained, was mistakenly informed by a third party, Tye St. James, that Thompson had signed the MCRSA on behalf of Satellite. Satellite claims that the inaccurate information prompted counsel to advise Thompson to sign the disclosure statement for submission to the Commission. Pet. at 4-6. Satellite further states: "Later, assuming that whether or not Satellite's partners had all signed, it could not hurt to clarify Satellite's non-participation, she signed a document rescinding the MCRSA." *Id.* at 6.

6 . Satellite has not shown any factual justification for revising our earlier determination. Nonetheless, further discussion of Thompson's testimony may be of assistance to subsequent reviewing authorities since in our *Decision* we adopted without comment the ALJ's explicit rejection of Thompson's explanation above. *See I.D.* at ¶ 462 & n.105. As noted in the Bureau's opposition, at 2-3, the preponderance of the evidence supports the ALJ's finding and discredits Thompson's self-serving assertion that she was not signing a final document on behalf of the partnership. The context of Thompson's signing and attendant circumstances is revealing. Tye St. James, the partnership's organizer who also served as its initial manager and appointed Thompson as Satellite's designated signing partner, forwarded to Thompson on the eve of the first lottery drawing a letter enclosing a copy of the execution document and signature sheet for the MCRSA with a notation that she should sign on a line designated as Participant # 2, include the partnership name and her signature, and have her signature promptly notarized. *See* Bureau Exhs. 272, 273. The letter itself directed that the participating partnerships should sign on different signature lines. *Id.* Ms. Thompson printed her name and address on the signature sheet under the heading Participant # 2; placed her signature on a line asking for the signature; got the signature notarized; inserted September 22 in the blank spaces of the execution document that read: "This Mutual Contingent Risk-Sharing Agreement ('Agreement') is entered into effective this *22nd* day of *September* 1988, by and among the below-listed individuals or entities (the Participants')"; and immediately returned the parcel to St. James by Federal Express. *Id.; I.D.* at ¶ 461.

7. Although Satellite argues that the signed document was only a draft to be shown to the Commission for clearance, time was of the essence to ensure Satellite's participation in the MCRSA before the first lottery, scheduled for September 23, 1988, and Thompson's actions show that she fully comprehended this as evidenced by her quick turnaround, including filling in the effective date and getting her signature notarized. She also testified that it was her understanding that she was to sign before the first lottery was held. Tr. 8960. The instructions by St. James and the letter itself about what was going on were clear. The letter stated that the enclosure was to link the partnerships, and that if the partnerships decided to participate in the linking program, they should each execute a different signature line on the signature sheet of the execution document. *See* Bureau Exh. 272. Satellite also attempts to make much of the fact that Thompson printed her name, rather than the name of the partnership as Participant #2 to support Thompson's explanation that she was signing as an individual. Her explanation is not credible, however, in light of the clear instructions above, her immediate return of the time-sensitive document to St. James without consulting the other partners, and her subsequent behavior. When Satellite's participation in the MCRSA was ratified by ballot of the partners in late September and early October 1988, an event known by Thompson (Tr. 9028), she never told them that she had not signed on behalf of the partnership and that the MCRSA was not signed for the partnership. Nor did Thompson object to anyone that Satellite had been erroneously identified as one of the MCRSA participants when the Satellite partners received a copy of a "Cellular Bulletin" that listed the names of all of the participants to the MCRSA. Instead, Thompson affirmatively held out the partnership as a participant to the MCRSA, both when she attended a conference for the lottery winning partnerships and spoke to other partners of the MCRSA participants, *see* Tr. 9018, and when sending out letters to 28 Members of Congress. Tr. 1483-86; *I.D.* at ¶ 478. Satellite's final argument that its disclosure and rescission of the MCRSA (in late 1989) should not be construed as evidence of its participation in the MCRSA because the reporting resulted from erroneous information from third-party Tye St. James, is not persuasive since Thompson's acknowledgment of Satellite's participation in the MCRSA to the Congressmen was made in July 1991, nearly two years after receipt of the allegedly erroneous information, but only three and one-half months before Thompson revised her story at hearing. Ms. Thompson's change of story occurred only after Satellite became fully aware that the license was in serious jeopardy, and it was an effort to try and save the win.

**Crystal.**

8. Crystal, a licensee, raises three areas of alleged error. Initially, it contends that the Board failed to observe the mandate of the *Hearing Designation Order* by failing to distinguish between the licensees and applicants in this case, thus, forcing equivalent outcomes in the revocation and application proceedings. Second, it contends that its conduct does not support revocation, arguing that the Board focused on the actions of The Cellular Corporation (TCC), which created the MCRSA, rather than on the actions and motivations of Crystal and its owners with respect to their involvement in the MCRSA, and that Crystal should not be held accountable for the misconduct of TCC. And finally, Crystal charges that the Board erred in holding that the ALJ's errors regarding the burden of proof and burden of proceeding were "harmless error."

9. Contrary to Crystal's initial allegation, the Board did not apply the same analysis to both the licensees and applicants. *See Decision*, at ¶ 60 (noting discrete analytical approaches required for applicants and licensees). The applications were dismissed as defective pursuant to 47 CFR § 22.20 based on the applicants' entering into the MCRSA and the attendant violations of 47 CFR §§ 22.33, 22.921, and 22.922. *See Decision*, at ¶ 51. The licenses, by contrast, were revoked premised on the ALJ's findings that the licensees had: (1) willingly entered into the MCRSA to achieve results similar to those previously derived from so-called "alliances," which the licensee partners knew had been banned by the Commission; and (2) concealed that participation from the Commission until further nondisclosure was futile. *See Decision*, at ¶ ¶ 62, 71. We included an additional recitation of certain facts to show that the ALJ's characterization of the licensees was fully supported by the record. *See* ¶ ¶ 63-71. The single paragraph cited by Crystal as support for its contention, *i.e.*, ¶

72, does not hold to the contrary. There, we stated that Section 312(a)(2) of the Act authorizes the Commission to revoke a license "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." Noting further that the licenses would not have been issued but for the licensees' deliberate and calculated concealment of the MCRSA prior to grant, we held that Section 312(a)(2) was applicable with respect to the licensees. Crystal was not deprived of the protections normally accorded licensees since we found that the Bureau had met its burdens of proceeding and proof in demonstrating that Crystal's license should be revoked for conditions that would have warranted the Commission to deny Crystal's initial application.

10. Crystal's second contention that its misconduct does not warrant revocation of the license and that the focus of our *Decision* is misplaced, is also unavailing. At the outset, much of Crystal's specific arguments are essentially rearguments of exceptions raised by other parties and will not be reconsidered here. Reconsideration will not be granted merely for the purpose of rehashing arguments already considered. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965). However, with respect to Crystal's central complaint concerning the purported focus of the *Decision*, the Board found that, in light of the magnitude of the number of applications (more than 11,500) and parties (20 separate entities captioned here) participating in the MCRSA, it would be helpful in understanding our disposition to set forth the pertinent background leading up to the MCRSA. *See Decision*, at ¶ ¶ 8-23. After reviewing the record concerning the circumstances regarding each individual applicant and licensee, including Crystal, we found only insignificant differences in their participation in the MCRSA. Additionally, the *I.D.* set forth 620 paragraphs of detailed findings relative to the applicants and licensees (¶ ¶ 80-700), including 30 paragraphs devoted exclusively to Crystal. Based on a review of the evidence and the exceptions, there was no reason to repeat or to disturb the ALJ's findings. *Decision*, at ¶ ¶ 62, 71. Indeed, Crystal's specific exceptions to the factual findings of the *I.D.* consisted of only 4 pages (pp. 18-22 of Jt. Br.), and the bulk of those exceptions pertained to an abuse of process issue and forfeiture directed against Crystal and certain other licensees. The abuse of process issue and forfeiture were ultimately decided by the Board in the licensees' favor, *see Decision*, at ¶ ¶ 83-84; and Crystal's sparsely scattered disagreements relating to other specific factual findings were denied as non-decisional. *Id.* at ¶ 71.

11. The Board did not hold Crystal or the other licensees accountable for the misdeeds of TCC, as Crystal claims; nor did we revoke Crystal's license because of frustration at not being able to punish TCC directly. Crystal argues that the Commission's revocation authority under Section 312 of the Communications Act is permissive, not mandatory, and that revocation is invoked only where the licensee has shown "such disdain for the Commission's rules that he must be deprived of his license," citing *Jon P. Scheffenacker*, 45 RR 2d 153, 155 (Rev. Bd. 1979). Crystal Pet. at 17-18. Crystal argues that nothing in its conduct would justify revocation of its license. *Id.* However, our ancillary discussion at ¶ ¶ 64-71 concluded that all the licensees, including Crystal, discussed, understood, favored, and willingly entered into the illegal linkage arrangement of the MCRSA, and then concealed their participation from outsiders and the Commission. In Crystal's case, all of the Crystal partners participated in a conference call with St. James and William Franklin, the draftsman of the MCRSA, where they discussed the MCRSA's benefits and risks shortly before the partnership's signing partner, Ellen Kirwan, affixed her signature to it. *I.D.* at ¶ 505; Tr. 8585-89. Kirwan testified that she was sure they discussed whether the MCRSA should be disclosed (Tr. 8588); and that all agreed to enter the MCRSA (Tr. 8591). She further testified that she believed she was signing with the authority of the partnership (Tr. 8591), a belief confirmed when the partners subsequently ratified her signing by voting by ballot to enter the MCRSA. Bureau Exh. 167. Kirwan and Tye St. James, Crystal's manager, also participated in the recorded conference call of September 20, 1988 with Franklin, where they learned there was only a 50% chance the Commission would find out about the MCRSA because:

> [W]hat it takes is somebody who has got to find that one of your partnerships has signed an agreement, and be able to make some reasonable allegations based on that ... The Communications Act requires that those allegations be supported by sworn statements of someone with personal knowledge of the relevant facts and that people just aren't going to have that.

AALA/CFL Exh. 28 at 11; *Decision*, at ¶ 20. There is no evidence that Kirwan was not authorized to act on the partnership's behalf; thus, the partners cannot disassociate themselves and the partnership from responsibility for the partnership's action. There is no persuasive rebuttal evidence to show that Crystal was the innocent victim of TCC's manipulations as Crystal would have us believe. Crystal has offered no new facts or circumstances to demonstrate that our earlier determination was incorrect, and we will not rehash our *Decision* here. *See Rio Grande Broadcasting Co.*, 8 FCC Rcd 8726 (Rev. Bd. 1993)(reconsideration appropriate only where petitioner has shown "manifest error or omissions so material that their correction will result in substantial alteration of the original decision").

12. Crystal's final contention concerning the ALJ's actions on the burdens of proceeding and proof have been considered by the Board (¶ ¶ 73-74, 76) and will not be repeated here. *WWIZ, supra.* Crystal does posit an example allegedly showing the ALJ's purported misunderstanding of the burdens, claiming that the ALJ found against Crystal because of Kirwan's failure to recall details of transactions and telephone calls. Pet. at 22. However, the ALJ's remarks concerning Kirwan do not establish wrongful placement of the burdens. Rather, Kirwan's poor recollection failed to rebut the case made by the Bureau.

13. *Miscellaneous.* A few additional matters warrant action on our part. Jaybar Communications filed an amendment shortly after adoption of the *Decision* but before its release date. We will accept the amendment, which was filed pursuant to 47 CFR § 1.65 and reported that one of Jaybar's partners died and his interest is being held in his estate. A-1 Cellular Communications and Cranford Cellular Communications also filed other petitions for leave to amend on November 1, 1994, which were informally referred to the Board by the Commission's Adjudication Division. Both amendments report ownership changes that are permitted under 47 CFR § 22.922(a)(7). We will accept

those amendments. Finally, on October 20, 1994, Crystal, along with intervenors Applicants against Lottery Abuses; Buckhead Cellular Communications Partnership; Cellular Applicants' Coalition; Thomas Domencich; Committee for a Fair Lottery; Miller Communications, Inc.; Skywave Partners; and ZDT Partnership, filed a Joint Motion for Approval of Settlement. Under the proposed settlement agreement, the intervenors agree to forbear further participation with respect to the Crystal license facility, either at the Commission or the United States Court of Appeals for the District of Columbia, in return for partial reimbursement of intervenors' legitimate out-of-pocket expenses, not to exceed $345,000. Even if the parties settle, however, the public interest questions raised by the intervenors still require consideration by the Commission. In the past, the Commission has objected to broadcasters' attempts to pay off parties who have filed complaints raising valid public interest questions. *Compare Tidewater Teleradio, Inc.*, 24 RR 653 (1962) (settlement agreement to reimburse petitioner for expenses incurred in filing petition to deny in return for petitioner's forbearance from filing further objections disapproved where charges could not be withdrawn) *with Office of Communications of United Church of Christ v. FCC*, 456 F.2d 519 (D.C. Cir. 1972) (Court "specifically overrule[d] the Commission's principle of general application that in no petition to deny situation is it in the public interest to permit reimbursement"). Here, however, the instant settlement agreement, in the context of a multiparty cellular revocation proceeding, raises a public interest policy question of first impression. We will therefore certify the joint motion to the Commission, pursuant to 47 CFR §0.363. *See Charles County Broadcasting Co., Inc.*, 25 RR 903, 906-07 (1963)(Board not authorized to make "new policy or change old policy").

14. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration, filed on August 22, 1994, by Algreg Cellular Engineering, Satellite Cellular Systems, and Crystal Communications Systems ARE DENIED; and

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed on June 29, 1994, by Jaybar Communications and on November 1, 1994, by A-1 Cellular Communications and Cranford Cellular Communications, respectively, ARE GRANTED, and the amendments ARE ACCEPTED; and

16. IT IS FURTHER ORDERED, That the Joint Motion for Approval of Settlement, filed October 20, 1994 by the parties listed in ¶ 13, above, and all related pleadings ARE CERTIFIED to the Commission for its consideration.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

C4 Media Cable Southeast, L.P.,
at Chatsworth, Georgia (GA0252)

Appeal of Denial of Request for
Confidentiality

## MEMORANDUM OPINION AND ORDER

**Adopted: November 9, 1994; Released: November 16, 1994**

By the Chief, Cable Services Bureau:

1. C4 Media Cable Southeast, L.P. ("C4"), has filed with the Commission an appeal of the denial by the City of Chatsworth, Georgia ("City"), of C4's request to keep confidential the information contained in C4's FCC Form 393, which was submitted to the City to justify C4's rates for basic cable television service.[1] For the reasons set forth below, we deny C4's appeal.

2. C4 submitted its FCC Form 393 to the City on January 31, 1994, in response to the City's request for its schedule of rates. At the same time, C4 requested that none of the information contained in the rate justification be made routinely available for public inspection. C4 contended that the material was confidential proprietary information, consisting of the details of its revenues, expenses (identified by category), profits and losses. According to C4, the rate justification information is "substantially identical" to the type of information afforded confidential treatment under Sections 0.457 and 0.459 of the Commission's rules. For this reason, and because the City apparently has "adopted the FCC's standard for dissemination of proprietary information to the public,"[2] C4 requests that the Commission review the City's denial of confidentiality and stay the City's ability to make the information available for public inspection. The City opposes C4's appeal, arguing that withholding the rate justification materials from public inspection would prevent the public from commenting in a meaningful way on the reasonableness of the cable operator's rates.

3. With respect to requests for confidentiality of rate justification materials filed with the Commission, we have denied such requests where the cable operator has failed satisfy its burden of demonstrating that disclosure is likely to cause substantial harm to its competitive position.[3] Likewise, in this case, it appears that C4 has made no allegations concerning the likelihood of competitive harm that would result if the materials are made available for public inspection.

4. Furthermore, because this appeal does not involve a determination of whether the franchising authority has acted consistently with the 1992 Cable Act[4] or our implementing rules, we have no basis for granting the relief requested.[5] Rather, this appeal raises the issue of whether the City properly refused to accord C4's rate justification materials confidential treatment. In order to evaluate this appeal, the Commission would have to determine whether the City complied with applicable state or local law, since Section 76.938 of our rules establishes that state or local law governs public access to proprietary information.[6] There is no evidence before us that the City has not complied with the applicable state or local law.

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the appeal of the City's denial of confidentiality for the rate justification materials submitted by C4 Media Cable Southeast, L.P., IS DENIED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] "FCC Form 393" is the shorthand name for "Determination of Maximum Initial Permitted Rates For Regulated Cable Programming Services and Equipment," the official form used by cable operators to show that regulated rates charged for the basic service and cable programming services tiers at least through May 14, 1994, conform with the FCC's benchmark. Cable operators file FCC Form 393 with local franchising authorities in response to notification that the local franchising authority is certified and is regulating basic service tier rates. Cable operators also file FCC Form 393 with the FCC in response to a complaint about rates charged for the cable programming service tiers. *See Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) (*"First Rate Order"*).

[2] *See* Letter to William Caton, Acting Secretary, Federal Communications Commission, from Mark J. Palchick, Counsel for C4 Media Cable Southeast, L.P., at p. 2 (dated April 28, 1994).

[3] *See TKR Cable Company of Ramapo*, 9 FCC Rcd 3346 (1994).

[4] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (amending the Communications Act of 1934 and codified at 47 U.S.C. §534, *et seq.)* (1992).

[5] 47 C.F.R. §76.944(a) (1994).

[6] *See* 47 C.F.R. §76.938.

Before the
Federal Communications Commission
Washington, D.C. 20554

Released: November 7, 1994

PUBLIC NOTICE

## COMMISSION ANNOUNCES THAT MUTUALLY EXCLUSIVE "SHORT FORM" APPLICATIONS (FORM 175) TO PARTICIPATE IN COMPETITIVE BIDDING PROCESS ("AUCTIONS") ARE TREATED AS EXEMPT FOR EX PARTE PURPOSES

In the *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994), *recon. Second Memorandum Opinion and Order*, FCC 94-215 (released August 15, 1994), the Commission adopted general rules to implement the authority conferred in the Omnibus Budget Reconciliation Act of 1993 to employ competitive bidding ("auction") procedures to choose among mutually exclusive applications for initial licenses. Under section 1.2105 of the new rules, the Commission requires applicants, in order to be eligible to bid, to submit a short-form application (FCC 175), together with any appropriate filing fee set forth by Public Notice. Section 1.2102 of the rules sets forth which services or classes of services of "mutually exclusive initial applications" will be subject to competitive bidding.

We have received inquiries from applicants and members of the public concerning which *ex parte* procedures apply to these applications, particularly in view of the fact that section 1.1208 of the Commission's *ex parte* rules ordinarily treats "mutually exclusive applications" as "restricted." (In restricted proceedings, no *ex parte* presentations directed to the merits or outcome of the proceeding are permissible unless such presentations are exempted under the rules.) Neither the *Second Report and Order* nor other related actions in PP Docket No. 93-253 addressed the question of the proper *ex parte* procedures that should apply to these application proceedings.

Auction proceedings differ from other types of application proceedings before the Commission from the standpoint of the magnitude and complexity of this new process and its implementation. Because the auction process is new to the Commission, applicants and members of the public have numerous, wide-ranging questions concerning the Commission procedures and requirements that apply to competitive bidding. We believe it is desirable, therefore, to facilitate and encourage a free flow of information between applicants and the Commission staff concerning these matters. Moreover, because auctions, rather than comparative hearings, are used to select among these mutually exclusive applicants, it seems unnecessary to employ the same procedural protections that ordinarily apply in other proceedings involving mutually exclusive applications.

For these reasons, we are not treating mutually exclusive short form applications (Form 175) filed pursuant to section 2.105 of the rules as restricted proceedings under section 1.1208 of the Commission's *ex parte* rules. Instead, we are treating these mutually exclusive applications as exempt proceedings and, therefore, not subject to the *ex parte* prohibitions that generally pertain to restricted proceedings. Proceedings involving auction applicants will become restricted, however, at such time as the required long form application is filed and has been formally opposed. *See* section 1.1208(c)(1)(i)(B). Moreover, particular proceedings relating to auction applications could become restricted for reasons unrelated to mutual exclusivity, e.g., waiver requests or similar pleadings that are filed and relate to the short form applications would be restricted if such waiver or other similar pleading is formally opposed, as defined in the *ex parte* rules. *See* sections 1.1202(e) and 1.1208(c)(1)(ii)(D); *also* sections 1.1204(a)(2)(ii) Note and 1.1208(b)(2).

Action by the Commission November 4, 1994, by Public Notice (FCC 94-283) by Chairman Hundt, Commissioners Quello, Barrett, Ness and Chong.

News Media contact: Rosemary Kimball (202) 418-0500. Office of General Counsel contact: Steve Bailey (202)418-1720.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 7, 1994**

**Released: November 16, 1994**

**CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

WNNX License Investment Company 1800C1-MGK
Licensee, Station WNNX-FM 9210502
140 East Market Street
York, Pennsylvania 17401

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b)(1)(D) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

By letter of November 23, 1992, we inquired into an alleged violation by Station WNNX (formerly WAPW), Atlanta, Georgia, of Section 73.1206 of the Commission's Rules. Section 73.1206 in pertinent part requires broadcast stations to inform parties to a telephone conversation of the station's intention to broadcast that conversation. Our letter informed you of a complaint that Station WNNX had, on February 24, 1992, broadcast a telephone conversation with the Police Chief of Frostproof, Florida, without informing him of its intention to do so.

Your reply of December 18, 1992, concedes the violation, urging in mitigation that it occurred in spite of your repeated instructions and expressed policies to station managers, program directors and programming personnel. You express your regret at the incident, which you characterize as an isolated one, and note that you have discontinued the general type of programming in which it occurred. These considerations, you argue, support sanctions no greater than a reprimand or admonition.

We cannot agree. The record indicates, and you do not disagree, that on or about February 24, 1992, Station WNNX broadcast a telephone conversation without informing a party to that conversation of its intention to do so. Nothing in your responsive pleading alters this fact. Thus, while you claim to have issued memoranda in 1969, 1989 and 1991 that were intended to remind employees of the need to comply with the requirements of Section 73.1206, it was not until after receipt of our letter of inquiry that employees were advised, by memorandum dated December 16, 1992, of the possibility of adverse consequences for violations of this and other rules.

Accordingly, pursuant to Section 503(b)(1)(D) of the Communications Act, WNNX License Investment Co. is hereby advised of its apparent liability for a forfeiture of two thousand dollars ($2,000) for its apparent willful violation of Section 73.1206 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Act, including "the nature, circumstances, extent, and gravity of the violation."

In *United States Telephone Ass'n v. FCC*, No. 92-1321 (D.C. Cir. July 12, 1994), the Court set aside our *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993), in which we established guidelines for determining appropriate amounts for violations of various Commission rules, including the one at issue here. In assessing this forfeiture, we have undertaken to apply directly the statutory factors in 47 U.S.C. Section 503(b) to the particular facts of this case. In particular, we are setting the forfeiture at a low level because of the apparent singularity of the violation and the lack of egregiousness associated therewith. We have also reviewed actions taken prior to the *Policy Statement* and have found consistent assessments of $2,000 forfeitures for similar violations of the telephone broadcast provision.[1]

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Examples include *Jacor Communications, Inc*, MMB, April 30, 1990; *Gannett Texas Broadcasting, Inc.*, MMB, April 30, 1990, and *The Hearst Corp.*, MMB, November 6, 1990.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 7, 1994**

**Released: November 16, 1994**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

| | |
|---|---|
| KRIJ Partners, A California Ltd. | 8310-SP |
| Partnership, Licensee | 93090179 |
| Radio Station KHSL(FM) | 93120602 |
| 710 River Street | 94021420 |
| Santa Cruz, CA 95060 | |

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. Our action is based on the facts set forth below.

The Commission received a complaint from Ms. Jennifer Roberts alleging that on June 1, 1993, two disc jockeys from Station KHSL(FM) placed a telephone call to her place of business, and without informing her in advance, recorded the conversation and subsequently broadcast it. Based on this complaint, the Commission sent KRIJ Partners a letter of inquiry dated December 9, 1993. We received a response dated December 17, 1993, which was signed by KHSL(FM)'s former station manager, Sharon Bonds. A February 4, 1994, addendum signed by Mr. Gary R. Weinstein, General Partner of KRIJ Partners, did not add any new information to the original response but confirmed its accuracy. By a further letter of inquiry dated April 1, 1994, we questioned the discrepancy between the audiotape of the conversation (which was provided by the complainant) and the station's response denying that the conversation took place. The licensee responded to the second inquiry by letter dated April 22, 1994.

Your first response states that KHSL(FM)'s policy of compliance with the Commission's rule regarding the broadcast of telephone conversations is strictly enforced and adhered to at all times. The response does not provide any specific information addressing the complainant's allegations, but states that there are "no records or tapes to indicate this call was placed." A December 11, 1993, statement attached to your response is signed by Gus Smith and Ron Woodward, two KHSL management officials, who assert that "KHSL-FM did not place this telephone call." These statements, however, are refuted by the audiotape of the conversation. The audiotape contains the following conversation:

Ms. Roberts: Hello, can I help you?

Disc Jockey: Hi, who's this?

Ms. Roberts: This is Jennifer.

Disc Jockey: Hi, Jennifer. Uh, did someone fax something in about a hot country lunch?

Ms. Roberts: Yes.

Disc Jockey: Was it you?

Ms. Roberts: Yes.

Disc Jockey: OK. Well. . .

Ms. Roberts: Am I on the radio?

Disc Jockey: No. No, but you're soon to be.

In response to our second letter of inquiry, you state that the station had no record of the call and neither of the station's two morning show disc jockeys remembered placing the telephone call. Therefore, you claim, the staff at the station assumed that the call had not been made, an assumption which was not questioned by the licensee before it was made part of your original response to the Commission. You state that "the station wants to emphasize that it still does not know if the call was actually aired," but you "assume for the purpose of this response" that it did.

Your April 22, 1994, response states that "it is obvious from the tape that was forwarded [if it was broadcast] that there is at most a technical violation of the FCC's rules." You also argue that "the station had reason to think that the [complainant] had at least consented to the broadcast by laughing when told that she was not on the air but she would be." You suggest that the staff thought it had permission to broadcast the taped conversation. Section 73.1206 of the Commission's Rules, however, requires that "[b]efore recording a telephone conversation for broadcast, . . . a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation." It is apparent that Ms. Roberts was not informed that the conversation was being recorded for future broadcast until well into the conversation. The rule does not permit the licensee to presume that the other party should have been aware, from the context of the conversation, that the conversation was being recorded. The only exceptions are where the other party is associated with the station or where the other party originates the call and it is in connection with a program in which the station customarily broadcasts telephone conversations. Neither of these exceptions applies with respect to Ms. Roberts.

Based on the record in this case, it appears that Radio Station KHSL(FM), Chico, CA, violated Section 73.1206 of the Commission's Rules on June 1, 1993, when, without informing Ms. Jennifer Roberts in advance, two KHSL(FM) disc jockeys recorded a telephone conversation with Ms. Roberts which they intended to, and did, broadcast. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, KRIJ Partners, A California Ltd. Partnership, licensee of Station KHSL(FM), Chico, CA, is hereby advised of its apparent liability for a forfeiture in the amount of $2,000 for said incident, which constitutes a willful violation of Section 73.1206. The amount of the forfeiture was determined after consideration of the factors set forth in Section 503(b)(2) of the Act, including "the nature, circumstances, extent, and gravity of the violation."

In regard to this forfeiture proceeding, you are afforded a period of 30 days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be

reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Community TV Corp.
in the Town of
Merrimack, New Hampshire (NH0047)

Request for Confidentiality

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 9, 1994; Released: November 16, 1994**

By the Chief, Cable Services Bureau:

1. The Commission has received a request filed by Community TV Corp., d/b/a The Americable Group ("Community TV"), that information submitted by Community TV pursuant to Section 76.956 of the Commission's rules not be made routinely available for public inspection as it otherwise would be pursuant to our rules.[1] For the reasons set forth below, we deny Community TV's request.

2. In response to a complaint regarding the rates charged for cable programming service in the town of Merrimack, New Hampshire, Community TV filed an FCC Form 393 pursuant to Commission rules.[2] The submission was accompanied by a request[3] that none of the information contained in the rate justification be made routinely available for public inspection pursuant to Section 0.459 of the Commission's rules. Community TV contended that the material was confidential proprietary information, consisting of the details of its revenues, expenses (identified by category), profits and losses.

3. Section 0.459 of the Commission's rules provides that a party submitting information to the FCC may request confidentiality with respect to specific portions of the material. However, the party must show by a preponderance of the evidence that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. §552 ("FOIA").[4] Exemption 4 of the FOIA authorizes the Commission to withhold from public disclosure trade secrets as well as confidential commercial or financial information.[5]

4. Exemption 4 of the FOIA covers two broad categories: (1) trade secrets; and (2) information which is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.[6] The confidential or privileged criterion is satisfied if either (1) disclosure of the information is likely to impair the government's ability to obtain necessary information in the future or (2) disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.[7]

5. In this case, Community TV does not claim that the information constitutes a trade secret. Community TV asserts that the information is commercial or financial information submitted pursuant to a regulatory requirement, and thus Community TV is required to show that the information is privileged or confidential. Since the FCC's information-gathering abilities in this context would not be impaired by disclosure, the pivotal question is whether disclosure of the material is likely to cause substantial competitive harm to Community TV.[8]

6. The Commission has said, "While an elaborate economic analysis need not be made to establish the likelihood of substantial competitive injury, conclusory and generalized allegations cannot support nondisclosure."[9] In addition, requests for confidentiality must conform to Section 0.459 of the rules and "casual" requests for confidentiality will not be honored.[10] In this case, Community TV has claimed that the submission contains detailed financial information similar to that routinely afforded protection under Section 0.457(d)(1)(i), (iii) and (iv) of our rules. However, Community TV has made no allegations con-

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[1] *See* 47 C.F.R. §0.455(d) (1993).

[2] "FCC Form 393" is the shorthand name for "Determination of Maximum Initial Permitted Rates For Regulated Cable Programming Services and Equipment," the official form used by cable operators to show that regulated rates charged for the basic service and cable programming services tiers at least through May 14, 1994, conform with the FCC's benchmark. A cable operator files an FCC Form 393 with a local franchising authority in response to notification that the local franchising authority is certified and is regulating basic service tier rates. A cable operator also files an FCC Form 393 with the FCC in response to a complaint about rates charged for the cable programming service tiers. *See Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, 8 FCC Rcd 5631 (1993).

[3] The request for confidentiality was contained in a document titled Response of Community TV Corp. to a Complaint Concerning Rates for Cable Programming Service Provided in Town of Merrimack, New Hampshire (filed February 8, 1994). The Certificate of Service indicates that the document was served upon the Merrimack Board of Selectmen, who did not file a response to the confidentiality request.

[4] 47 C.F.R. §0.459(d).

[5] *See* 5 U.S.C. §552(b)(4) (1993).

[6] *Id.*

[7] *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The Court of Appeals later reaffirmed this test, but confined it to those cases involving information that persons were *required* to provide the government. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) ("Critical Mass II"). In cases involving financial or commercial information that was supplied *voluntarily* to the government, Exemption 4 applies if the information is of a kind that the provider would not customarily release to the public. *Id.* at 879-880.

[8] *See See TKR Cable Company of Ramapo*, 9 FCC Rcd 3346 (1994) (denying confidentiality of rate justification materials on grounds that cable operator failed to demonstrate likelihood of competitive injury resulting from disclosure).

[9] *National Exchange Carrier Ass'n, Inc.* (Release of Common Line Pool Audit Report), 5 FCC Rcd 7184 (1990) (quoting *Nat'l Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680-81 (D.C. Cir. 1976)) ("*NECA*").

[10] *See* 47 C.F.R. §0.459(c); *Western Cities Broadcasting, Inc.*, 6 FCC Rcd 3599, 3600 (1991).

cerning the likelihood of competitive harm which would result if the materials are made available for public inspection.

7. We conclude, therefore, that Community TV has failed to demonstrate any likelihood of competitive injury resulting from disclosure of the rate justification materials. Furthermore, there is a compelling public interest supporting disclosure of rate justification information.[11] Subscribers have a vital interest in the conduct and outcome of cable rate proceedings which are based upon these materials. For all of these reasons, we find that Community TV has failed to make a showing adequate to warrant the granting of its request for confidentiality.

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the request of Community TV Corp. for confidentiality of its rate justification materials IS DENIED.

9. IT IS FURTHER ORDERED, pursuant to Section 0.459(g) of the Commission's rules, the Cable Services Bureau will provide Community TV Corp. with notice of this denial and the time for seeking review by the Commission or a judicial stay by telephone, with follow-up notice in writing.

10. IT IS FURTHER ORDERED, pursuant to Section 0.459(g) of the Commission's Rules, that Community TV's rate justification materials will be available for public inspection on the sixth working day following the oral notice of this Order to Community TV Corp. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[11] *See, e.g. NECA*, 5 FCC Rcd at 7185 (presence of compelling public interest supported disclosure of financial data); *Bell Communications Research, Inc.*, 7 FCC Rcd 891, 892 (1992) (same); *New York Telephone Co.*, 5 FCC Rcd 874 (1990) (same).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-4**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8413 |
| Table of Allotments, | RM-8460 |
| FM Broadcast Stations. | |
| (Nashwauk and Walker, Minnesota)[1] | |

**REPORT AND ORDER**

**Adopted: November 8, 1994; Released: November 17, 1994**

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 659 (1994), issued in response to a petition filed by Roger Paskvan ("Paskvan"), requesting the allotment of Channel 270A to Walker, Minnesota, as that community's second FM broadcast service. Paskvan filed comments restating his interest in the allotment at Walker.[2] Ingstad Broadcasting, Inc. ("Ingstad") filed a counterproposal.[3] Paskvan and Ingstad filed reply comments.

2. Ingstad's counterproposal requests the allotment of Channel 270C3 to Nashwauk, Minnesota, as that community's first FM broadcast service.[4] Ingstad states that Nashwauk has a population of 1,026 persons, along with a town mayor, police and fire department, and a hospital. Further, Nashwauk has a weekly newspaper, several churches and its own elementary school and high school. According to Ingstad, Nashwauk is a substantial and fully functioning community deserving of an FM radio station.

3. After consideration of the information filed in this proceeding, we believe the public interest would be served by the allotment of FM channels to Walker and Nashwauk, Minnesota, in order to provide additional broadcast service to both communities. In response to the *Notice*, we will allot Channel 270A to Walker, Minnesota, as that community's second FM broadcast service. Channel 270A can be allotted to Walker in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 3 kilometers (2 miles) northeast of the community.[5] The site restriction will prevent a short spacing to Channel 270C1, Station KFGO-FM, Fargo, North Dakota. In response to the counterproposal filed by Ingstad and the expression of interest from Paskvan, we shall allot Channel 275C3 to Nashwauk, Minnesota, as that community's first local FM service. Channel 275C3 can be allotted to Nashwauk, Minnesota, in compliance with the Commission's spacing requirements without a site restriction.[6] Canadian concurrence has been received for theallotment of Channel 270A at Walker and Channel 275C3 at Nashwauk as both communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 3, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Nashwauk, Minnesota | 275C3 |
| Walker, Minnesota | 256C1, 270A |

5. The window period for filing applications for Channel 270A at Walker, Minnesota and Channel 275C3 at Nashwauk, Minnesota, will open on **January 3, 1995**, and close on **February 3, 1995**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of Nashwauk has been added to the caption.

[2] Paskvan's comments were received after the cut-off dates established in this proceeding along with a motion to accept. Ordinarily, in a contested proceeding, late-filed comments would not be accepted. However, in this instance, a channel is available for allotment at both communities. Therefore, we shall accept Paskvan's comments stating his intent to file an application for a channel at Walker. Further, in response to Paskvan's concerns regarding the freeze and timely filed comments, it should be noted that although there was a freeze on comparative proceedings during which time the Mass media Bureau did not adopt *Report and Orders* which opened new FM filing windows, the comment deadlines set out in *Notices of Proposed Rule Making s* were not suspended. *See FCC Freezes Comparative Proceedings*, FCC 94-41, released February 25, 1994. On August 4, 1994, the Commission resumed the opening of FM filing windows in the same manner as prior to the freeze. *See Modification of FCC Comparative Proceedings Freeze Policy*, FCC 94-204, released August 4, 1994.

[3] Public notice of the counterproposal was given on May 4, 1994, Report No. 2007 (RM-8460).

[4] Station WKKQ-AM is assigned to Nashwauk.

[5] The coordinates for Channel 270A at Walker are 47-07-08 and 94-33-22.

[6] The coordinates for Channel 275C3 at Nashwauk are 47-22-36 and 93-09-48.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-28**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8172 |
| Table of Allotments, | RM-8299 |
| FM Broadcast Stations. | |
| (Colonial Heights, Tennessee) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 8, 1994; Released: November 17, 1994**

By the Acting Chief, Allocations Branch:

1. At the request of Murray Communications ("petitioner"), permittee of Station WLJQ(FM), Channel 290A, Colonial Heights, Tennessee, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 1794 (1993), proposing the substitution of Channel 290C3 for Channel 290A at Colonial Heights and modification of petitioner's authorization to specify operation on the higher powered channel. Bruce G. Morrison, Chief Operating Officer of Station WMXK-FM, Morristown, Tennessee, filed comments on behalf of the Station WMXK-FM.[1] Petitioner filed a counterproposal[2] and reply comments. Petitioner's counterproposal requests the substitution of Channel 240C2 or, alternatively, Channel 240C3 for Channel 290A at Colonial Heights, Tennessee, and modification of its construction permit to specify the upgrade. In order to accommodate these proposals, petitioner also requests the substitution of Channel 290A for Channel 231A at Tazewell, Tennessee, Channel 231A for Channel 240A at Morristown, Tennessee, Channel 252A for Channel 290A at Whitley City, Kentucky, and a change of site for Station WAEY-FM, Princeton, West Virginia.[3] The Commission subsequently issued an *Order to Show Cause*, 8 FCC Rcd 7901 (1993), to WFSM, Inc., and Franklin Communications, Inc. ("Franklin"),[4] respective licensees of Stations WCTU(FM), Channel 231A, Tazewell, Tennessee, and WMXK(FM), Channel 240A, Morristown, Tennessee, directing the licensees to demonstrate why their licenses should not be modified to specify operation on Channel 290A and 231A in lieu of Channel 231A and Channel 240A, respectively. In response to the *Order to Show Cause*, Franklin filed opposing comments. Responsive comments were filed by petitioner.[5]

2. As an initial matter, petitioner contends that its counterproposal constitutes an incompatible channel swap, thereby protecting it from competing expressions of interest. Although petitioner's counterproposal was placed on public notice, additional engineering analysis indicates that petitioner's counterproposal does not constitute an incompatible channel swap. In adopting the rule which permits upgrades on co- and adjacent channels without allowing competing expressions of interest, or incompatible channel swaps, the Commission stated that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create the mutually exclusive relationship required to comply with Section 1.420(g)(3) of the Commission's Rules.[6] As an example, the Commission contemplated a situation where a licensee on Channel 240A at community A seeks to upgrade on Channel 271C2. To do so, the licensee on Channel 240A must exchange channels with the licensee on Channel 270A in community B. The allotment of Channel 271C2 to community A must require the deletion of channel 270A at community B and channel 240A must be the only class A which can be substituted at community B. As the Commission stated, "... although channels 240A and 271C2 are not adjacent, nevertheless Channel 271C2 is not available in the *Ashbacker* sense for application by other interested parties, because Channel 270A must be replaced with Channel 240A in order for the upgrade to be possible..." Here, petitioner does not propose to swap its current operating channel with another authorized facility but rather proposes a number of channel substitutions plus one station moving its transmitter site in order to accommodate petitioner's upgrade on Channel 240C2 or 240C3. Accordingly we will deny petitioner's counterproposal, however, we note that Channel 290C3 can be substituted for Channel 290A at Colonial Heights and the allotment of this channel does not require an existing station to change frequency or site.

3. We believe the public interest would be served by substituting Channel 290C3 for Channel 290A at Colonial Heights since it would enable Station WLJQ(FM) to expand its coverage area. Channel 290C3 can be allotted to Colonial Heights in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.7 kilometers (10.4 miles) southwest to accommodate its transmitter site to the extent necessary to clear the proposed substitution of Channel 240C2 or, alternatively, Channel 240C3 for Channel 290A at Colonial Heights.

[1] Morrison's letter and subsequent comments were late- filed, and were not accompanied by a request for their acceptance. Therefore, Morrison's comments will not be considered.

[2] Public Notice of the counterproposal was given July 29, 1993, Report No. 1955 and a corrected Public Notice was issued on August 3, 1993.

[3] The three channel substitutions and change of transmitter site for Station WAEY-FM required for Channel 240C2 are also required for Channel 240C3. In this regard, we note that Station WHAY(FM) has consented in advance to the channel change at Whitley City, Kentucky, and Station WAEY(FM) also agreed to

[4] On December 22, 1993, the Commission approved the application for assignment of license from Franklin Communications, Inc. to Newport Publishing Company.

[5] Due to the resolution of this proceeding, we need not address the issues raised by Franklin.

[6] *See Modification of FM Broadcast Licenses to Higher Class*

commodate petitioner's site.[7] As requested, we will also modify Station's WLJQ(FM)'s construction permit to specify operation on Channel 290C3.[8]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 3, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Colonial Heights, Tennessee | 290C3 |

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of for Station WLJQ(FM), Colonial Heights, Tennessee, IS MODIFIED to specify operation on Channel 290C3, in lieu of Channel 290A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Murray Communications, permittee of Station WLJQ(FM) is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That the counterproposal filed by Murray Communications (RM-8299), requesting the substitution of Channel 240C2 or 240C3 for Channel 290A at Colonial Heights, Tennessee, IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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*Co-Channels or Adjacent Channels*, 60 R.R. 2d 114,120 (1986).

[7] The coordinate for Channel 290C3 at Colonial Heights are North Latitude 36-21-11 and West Longitude 82-35-24.

[8] Petitioner stated its intention to apply for Channel 290C3 if the substitution of Channel 240C2 or 240C3 could not be implemented at Colonial Heights.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-133**

In the Matter of

Amendment of Section 73.202(b), RM-8539
Table of Allotments,
FM Broadcast Stations.
(Wewoka, Oklahoma)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 9, 1994; Released: November 17, 1994**

**Comment Date: January 9, 1995**
**Reply Comment Date: January 23, 1995**

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jean and Jerry Spencer ("petitioners") requesting the allotment of Channel 284A to Wewoka, Oklahoma, as the community's first local FM broadcast service. Petitioners state their intention to apply for the channel, if allotted.[1]

### Technical Summary

2. Channel 284A can be allotted to Wewoka in compliance with the Commission's minimum distance separation requirements with a site restriction of 11 kilometers (6.8 miles) southwest to avoid short-spacings to Station KMYZ-FM, Channel 283C1, Pryor, Oklahoma, Station KREK, Channel 285A, Bristow, Oklahoma, and Station KTMC-FM, Channel 285A, McAlester, Oklahoma.[2] We note that the petitioners suggested a transmitter site 8 kilometers (5 miles) south-southwest of Wewoka (35-05-40 North Latitude; 96-32-35 West Longitude). However, use of this site would be short-spaced by 3 kilometers to Station KMYZ-FM, Channel 283C1, Pryor, Oklahoma.

3. We believe the public interest would be served by proposing the allotment of Channel 284A to Wewoka since it could provide the community with its first local FM broadcast service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Wewoka, Oklahoma | -- | 284A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 9, 1995,** and reply comments on or before **January 23, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerry Spencer
P.O. Box 1260
Wewoka, OK 74884
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a

[1] Although the rule making request was signed by the petitioners, they failed to include an affidavit verifying that the statements contained in their petition were accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, 3919, n.41 (1990). The petitioners are requested to rectify this omission in their comments.

[2] Although Station KTMC-FM's license has been modified to specify operation on Channel 286A pursuant to the *Report and Order* in MM Docket 92-280, we note that the station is presently still operating on Channel 285A. *See* 8 FCC Rcd 3710 (1993).

request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-132**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8529 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Reed City, Michigan) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 9, 1994 Released: November 17, 1994**

**Comment Date: January 9, 1995**
**Reply Comment Date: January 23, 1995**

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Steven V. Beilfuss ("petitioner"), seeking the allotment of Channel 247A to Reed City, Michigan, as that community's first local FM broadcast service. Petitioner provided an engineering study in support of the proposal and indicated he would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local FM service to Reed City, Michigan. Channel 247A can be allotted to Reed City consistent with the Commission's Rules provided there is a site restriction 1.9 kilometers (1.2 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station WKLT, Channel 248C2, Kalkaska, Michigan. Since Reed City is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the fact that the proposed allotment would provide a first local FM service to Reed City, Michigan, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Reed City, Michigan | --- | 247A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 9, 1995,** and reply comments on or before **January 23, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Steven V. Beilfuss
5355 N. Brentwood
Grawn, Michigan 49637

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 247A at Reed City are 43-51-31 and 85-30-50.

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1).303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TECHNOLOGY VENTURES INTERNATIONAL, INC.

File No. I-T-C-94-421

Application for authority under Section 214 of the Communications Act of 1934, as amended, to operate channels of communication via the PanAmSat and Solidaridad satellite systems between the U.S. and various locations

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: November 4, 1994; Released: November 18, 1994**

By the Chief, Telecommunications Division:

1. The Commission has under consideration the above-captioned application filed by Technology Ventures International, Inc. (TVII) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the U.S. and various locations using the PanAmSat (PAS) and Solidaridad satellite systems for the provision of private line, facsimile, voice and data services. The application was placed on the Commission's public notice and no comments were received.

2. Upon consideration of the subject application we find that its grant will serve the present and future public convenience and necessity.

3. Accordingly, IT IS ORDERED, that application File No. I-T-C-94-421 IS GRANTED and TVII is authorized to:

a. establish channels of communications between appropriately licensed earth stations in the U.S. and the PAS-1 system connecting with similar circuits between the satellite and those countries specified in Attachment A furnished by CVII's correspondents in those countries;

b. lease and operate facilities in the U.S. earth stations authorized to communicate with the PAS satellite system;

c. lease and operate necessary domestic connecting facilities;

d. use the facilities set forth in a,b, and c, above to provide service not interconnected with the public switched network (10 64-kbps circuits to each location) and service interconnected with the public switched network (6 64-kbps circuits to each location) between the U.S. and those countries listed in Attachment A subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems;

e. establish channels of communication between appropriately licensed earth stations in the U.S. and the Mexican Solidaridad satellite system for the provision of transborder services between the U.S. and Mexico consistent with INTELSAT Article XIV(d) consultations governing the use of the Solidaridad system.

4. IT IS FURTHER ORDERED that neither TVII nor any persons or companies directly or indirectly controlling or controlled by TVII, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TVII or any persons or companies controlling or controlled by TVII are parties.

5. IT IS FURTHER ORDERED the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits it wishes to operate via the PAS-1 satellite.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to the limitations specified under the separate systems policy, applicable consultations under Article XIV(d) of the INTELSAT Agreement and PAS's determination as to whether such capacity can be offered in light of these limitations.

10. This order is issued pursuant to Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane Cornell
Chief, Telecommunications Division
International Bureau

**ATTACHMENT A**

TVII is authorized to provide services between the U.S. and the following countries via the PAS-1 satellite system.

**A. For services not interconnected to the PSN**

**Ku-band Countries:**

Anguilla, Austria, Azerbaijan, Bahamas, Belgium, Bermuda, British Virgin Islands, Cayman Islands, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Monaco, Montserrat, Netherlands, Portugal, Romania, Russian Federation, Spain, Sweden, Switzerland, Turks and Caicos Islands, the United Kingdom, Yugoslavia.

**C-band Countries:**

Anguilla, Argentina, Aruba, Bahamas, Barbados, Bermuda, Bolivia, Brazil, British Virgin Islands, Cayman Islands, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Montserrat, Netherlands Antilles, Panama, Paraguay, Peru, Trinidad and Tobago, Turks and Caicos Islands, Uruguay and Venezuela.

**B. For services interconnected to the PSN**

**C-band Countries:**

Bahamas, Costa Rica, Dominican Republic, Netherlands Antilles, Panama and Peru.

**Ku-band Countries:**

Azerbaijan, Bahamas, Czech Republic, Portugal, Romania, Russian Federation and United Kingdom.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PP Docket No. 93-253**

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

**FURTHER NOTICE OF PROPOSED RULE MAKING**

**Adopted: August 1, 1994; Released: August 2, 1994**

By the Commission:

**Comment Date: September 12, 1994**
**Reply Comment Date: September 27, 1994**

## I. BACKGROUND

1. In the *Memorandum Opinion and Order* in GEN Docket No. 90-314, FCC 94-144 (released June 13, 1994), the Commission set forth rules for licensing Personal Communications Services in the 2 GHz band ("broadband PCS"), including specification of geographic service areas. We declined to allow general partitioning of those service areas, stating that such partitioning could be used to circumvent construction requirements, but we also recognized that the public interest may favor a different result "for particular groups of service providers, such as rural telephone companies, or to create PCS ownership opportunities for companies owned by minorities or women." *Memorandum Opinion and Order* at ¶ 83.

2. In the *Fifth Report and Order* in this proceeding, PP Docket No. 93-253, FCC 94-178 (released July 15, 1994) (*"Fifth Report and Order"*), the Commission determined that, to expedite the provision of broadband PCS in rural areas, which have historically suffered from delayed introduction of new services and fewer choices in service providers, rural telephone companies should be permitted to obtain PCS licenses by partitioning certain geographic areas from the licensed PCS service area (MTA or BTA). These companies will be permitted to acquire partitioned broadband PCS licenses in either of two ways: (1) they may form bidding consortia to participate in auctions, and then partition the licenses won among themselves, or (2) they may acquire partitioned broadband PCS licenses from other licensees through private negotiation. We required that partitioned areas conform to established geopolitical boundaries (such as county lines) and that each area include that portion of the rural telephone company's wireline service area that lies within the PCS license area. In addition, where a rural telephone company acquires a partitioned license from another PCS licensee, the partitioned area must be reasonably related to rural telephone company's wireline service area. *See Fifth Report and Order* at ¶ ¶ 148-153.

3. Our rationale in allowing partitioning for rural telephone companies is that these companies are uniquely positioned to use their existing infrastructure to provide broadband PCS in rural areas. Many rural telephone companies argued that if they were required to bid on entire Basic Trading Area or Major Trading Area licenses to obtain licenses covering their wireline service areas, they would be effectively barred from entering the broadband PCS industry. They contend that under a partitioning plan, they would be able to serve areas in which they already provide service, while the remainder of the PCS service area could be served by other more efficient providers.

## II. DISCUSSION

4. We wish to consider whether a similar post-auction broadband PCS partitioning plan should be adopted for the benefit of businesses owned by minorities and/or women. We note that some parties commenting on petitions for reconsideration that we received in GEN Docket No. 90-314 supported various forms of geographic partitioning.[1] Others, however, were opposed to partitioning.[2] The record has not been sufficiently developed on the issue of whether the public interest would be served by permitting businesses owned by minorities and/or women to hold partitioned licenses to enable the Commission to make a determination on this issue. We therefore seek further comment from interested parties.[3] Commenters should address the following issues: (1) whether allowing businesses owned by minorities and/or women to hold partitioned PCS licenses would serve the public interest; (2) if so, what parameters the Commission should provide for these entities to obtain partitioned licenses (*i.e.*, through what mechanisms should partitioned licenses be granted and what, if any, limitations should apply); and (3) whether any such partitioning should be prohibited for a period of time after initial PCS licensing, and if so, for what period. Commenters should focus on the public interest impact that allowing such partitioning would likely have. We are particularly interested in hearing from interested parties whether such partitioning could be expected to give rise to benefits corresponding to those we expect to derive from rural telephone company partitioning. We also seek comment on whether the potential benefits that may be derived by partitioning in this context outweigh any practical or administrative difficulties that might arise, and whether more rapid and better service will be provided to any areas as a result of the partitioning.

5. We also wish to explore whether the Commission should restrict the transfer or assignment of partitioned licenses (held by rural telephone companies or by businesses owned by minorities and/or women) for some

[1] *See, e.g.*, comments of GTE Service Corp., Association of Independent Designated Entities, McCaw Cellular Communications, Inc. on Petitions for Reconsideration in GEN Docket No. 90-314.

[2] *See, e.g.*, comments of MCI Telecommunications Corporation and comments of Nextel Communications, Inc. in GEN Docket No. 90-314.

[3] Comments submitted on this issue in GEN Docket No. 90-314 will also be considered in this proceeding.

period of time. We therefore seek comment on this issue, and ask commenters to address how long any such transfer restriction period should last.

## III. PROCEDURAL MATTERS

6. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this *Notice of Proposed Rule Making*. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

7. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

8. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before September 12, 1994, and reply comments on or before September 27, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, DC 20554. The complete text of the *Notice* may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, Room 236, Washington, D.C. 20554, telephone (202) 857-3800.

9. Issuance of this *Notice of Proposed Rule Making* is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, and Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

10. For further information concerning this proceeding, contact Toni Simmons, Office of Plans and Policy, (202) 418-2030.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals contained in this Further Notice of Proposed Rule Making (FNPRM). We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines provided above.

**A. Reason for Action.**

(i). This FNPRM is issued to obtain comment regarding the certain aspects of the implementation of Section 309(j) of the Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993 (Budget Act).

**B. Objectives.**

(ii). The Commission seeks to implement changes to the Communications Act that, *inter alia*, provide the Commission with the authority to award licenses to use the electromagnetic spectrum through competitive bidding.

**C. Legal Basis.**

(iii). The FNPRM is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, and Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

**D. Reporting, Recordkeeping and Other Compliance Requirements.**

(iv). The proposals under consideration in this FNPRM include the possibility of new reporting and recordkeeping requirements for a number of small business entities.

**E. Federal Rules Which Overlap, Duplicate or Conflict With These Rules.**

(v). None.

**F. Description, Potential Impact, and Number of Small Entities Involved.**

(vi). The rule changes proposed in this FNPRM could affect small businesses if they apply for or are granted licenses in the Personal Communications Services in the 2 GHz band (broadband PCS). The FNPRM proposes that certain entities be permitted to obtain broadband PCS licenses for geographic areas that are partitioned from other broadband PCS licenses. After evaluating the comments in response to this FNPRM, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

**G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.**

(vii). None.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ML MEDIA PARTNERS, L.P.
TRADING AS MULTIVISION
CABLE TV

Request for Stay of
Local Rate Order of the
City of Fairfield, California

**ORDER**

**Adopted: November 9, 1994; Released: November 10, 1994**

By the Chief, Cable Services Bureau:

1. ML Media Partners, L.P., d/b/a Multivision Cable TV ("Multivision"), the franchisee in the above matter, filed on August 10, 1994, a Request for a Stay of a Rate Order of the City of Fairfield, California Pending Appeal ("petition") of the local rate order adopted by the City of Fairfield, California ("City") on August 2, 1994. The City did not submit any pleadings in opposition to Multivision's petition. The local rate order establishes a new rate schedule for Multivision's basic service tier, associated equipment, and installations, and directs Multivision to issue refunds to subscribers for those charges since September 1, 1993 which were in excess of the newly established rates.[1] The main issue raised by Multivision in its petition centers on the proper regulatory treatment of Multivision's a la carte offerings.[2]

2. The Commission has issued numerous Letters of Inquiry to cable operators regarding the regulatory treatment of a la carte offerings. While a Letter of Inquiry has not been issued to the operator in this case, we will grant Multivision's petition pending the resolution of its Appeal, in order to minimize subscriber confusion and ensure regulatory consistency in this important area, as the Commission has done in other similar cases.[3]

3. During the period of this stay, Multivision is ordered to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Multivision to refund to its customers. Alternatively, Multivision may elect to post a bond for the benefit of the City. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if Multivision is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the City, on behalf of Multivision's subscribers.[4]

4. Accordingly, IT IS ORDERED that the local rate order adopted by the City of Fairfield, California is STAYED pending the resolution of Multivision's Request for Review.

5. IT IS FURTHER ORDERED that the amount of the refunds required by the City of Fairfield, California's local rate order SHALL BE PLACED by Multivision in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the City of Fairfield, for the amount of money the City of Fairfield has ordered Multivision to refund, plus interest. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of Multivision's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate.

6. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[2] In addition, Multivision takes issue with the calculation of hourly service charges, the deletion of "cap labor inside wiring" costs and disallowance of the home wiring maintenance fee.

[3] *See Century Cable of Southern California* (Brea, CA), DA 94-512 (rel. May 17, 1994); *Century Cable of Southern California* (La Habra, CA), DA 94-513 (rel. May 17, 1994); *Warner Cable Communications, Inc.* (Wadsworth, OH), DA 94-511 (rel. May 17, 1994); and *Paragon Cable* (Grapevine, TX), DA 94-1072 (rel. September 30, 1994).

[4] *See Comcast Cablevision of Tallahassee, Inc.*, DA 94-1071 (rel. September 30, 1994), in which the Commission authorizes the operator to post a bond in lieu of establishing an escrow account.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Liability of
Bay Television, Inc.,

Licensee of Television
Station WTTA(TV),
St. Petersburg, Florida,

for a Forfeiture

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 5, 1994; Released: August 5, 1994**

By the Commission:

1. On July 6, 1994, the Commission issued a Memorandum Opinion and Order, FCC 94-131, denying an application for review filed by Bay Television, Inc., appealing a $10,000 forfeiture order issued on August 16, 1993, by the Mass Media Bureau with respect to commercial overages in children's programming on Television Station WTTA(TV), St. Petersburg, FL. *See Bay Television, Inc.*, 8 FCC Rcd 5514 (MMB 1993).

2. On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit, in *United States Telephone Assn. v. FCC*, Case No. 92-1321 (*"USTA v. FCC"*), vacated the forfeiture standards established in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993) ("Policy Statement").

3. In calculating the forfeiture amount to be assessed against Bay Television, the Mass Media Bureau had relied upon the standards of the *Policy Statement*. Our decision denying the application for review also relied in part on those standards. In light of the *USTA v. FCC* decision, we, on our own motion, pursuant to the provisions of 47 C.F.R. § 1.108, set aside our previous decision and return the application for review to pending status.[1] This action is without prejudice to further action on the application for review and consideration of the appropriate forfeiture amount under applicable statutory and regulatory provisions and precedent.

4. Accordingly, IT IS ORDERED, that our July 6, 1994, decision denying the application for review of the $10,000 forfeiture assessed against Bay Television, Inc., licensee of WTTA(TV), St. Petersburg, FL, for violations of Section 73.670 of the Commission's Rules, is SET ASIDE, and that the application for review IS RETURNED to pending status.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] "The Commission may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action, as that date is defined in §1.4(b) of these rules." 47 C.F.R. § 1.108.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**ET Docket No. 94-32**

In the Matter of

Allocation of Spectrum Below
5 GHz Transferred from
Federal Government Use

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 20, 1994; Released: November 8, 1994**

**Comment Date: December 19, 1994**
**Reply Comment Date: January 3, 1995**

By the Commission:

## I. INTRODUCTION

1. By this action, we propose allocations for 50 megahertz of spectrum that was identified by the Department of Commerce for transfer from Federal Government to private sector use. The spectrum we are considering is at the bands 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz.[1] We believe that the allocations proposed herein will benefit the public by providing for the introduction of new services and the enhancement of existing services. These new and enhanced services will create new jobs, foster economic growth, and improve access to communications by industry and the American public.

## II. BACKGROUND

2. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993[2] (Reconciliation Act) was signed into law. The Reconciliation Act required that the Secretary of Commerce identify 200 megahertz of spectrum currently allocated for use by Federal Government agencies, for transfer to the FCC for use by the private sector. All of the 200 megahertz of spectrum recommended for reallocation must be located below 5 gigahertz, with at least 100 megahertz of this being below 3 gigahertz. The Reconciliation Act also required the Secretary of Commerce to issue within six months of its enactment a report making a preliminary identification of reallocatable bands of frequencies and to issue within 18 months a final report recommending the spectrum for reallocation.[3] In its report making a preliminary identification of spectrum, the Department of Commerce was required to identify at least 50 megahertz of spectrum for immediate reallocation.[4] The remaining spectrum is to be made available over a ten-year period.[5]

3. On February 10, 1994, the Department of Commerce released its report making a preliminary identification of spectrum for reallocation (Preliminary Report).[6] The frequency bands identified for reallocation in the Preliminary Report are listed in Appendix A. Three of these frequency bands, 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz, were identified for immediate reallocation. The Reconciliation Act also requires that the Commission allocate, and propose regulations to assign, the 50 megahertz of spectrum that is immediately available no later than 18 months after its enactment.[7]

4. Accordingly, on May 4, 1994, we released a *Notice of Inquiry* (*NOI*) in this proceeding seeking information on potential applications for the 50 megahertz of spectrum that is being transferred immediately from Federal Government to private sector use.[8] We stated in the *NOI* that spectrum reallocated for private sector use has the potential to provide for the continued growth and development of advanced communications and technologies, thereby creating new high technology jobs and economic growth. Although the spectrum considered in this proceeding has some characteristics that will affect its future use by non-Government applications, we believe that all of the spectrum can be used to promote advanced technologies and

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[1] By letter dated October 27, 1994, the President of the United States notified the Chairman of the Commission that Federal Government frequency assignments in these bands have been withdrawn and that the National Table of Frequency Allocations has been modified to reflect the reallocation of these bands.

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (approved August 10, 1993).

[3] *See* Reconciliation Act § 6001(a)(3), as codified at 47 U.S.C. § 923.

[4] The President must withdraw the assignment to a Federal Government station of any frequency recommended for immediate reallocation within 6 months of release of the preliminary report so that the spectrum is then available for exclusive non-Federal use. At least one-half of the 50 megahertz identified for immediate reallocation must be below 3 gigahertz and all of it must be identified for exclusive non-Federal use.

[5] Reconciliation Act § 6001(a)(3), as codified at 47 U.S.C. § 923(e)(2)(A).

[6] Preliminary Spectrum Reallocation Report, U.S. Department of Commerce, NTIA Special Publication 94-27, February, 1994.

[7] Reconciliation Act § 6001(a)(3), as codified at 47 U.S.C. § 925(a).

[8] *Notice of Inquiry*, 9 FCC Rcd 2175 (1994).

provide economic growth.[9] In response to our *NOI*, we received 77 comments and 17 reply comments.[10] These comments are summarized in Appendix D.

5. Internationally, 2390-2400 MHz is allocated in Region 2[11] on a primary basis to the fixed, mobile, and radiolocation services, and on a secondary basis to the amateur service.[12] Domestically, this band is currently allocated on a secondary basis to the amateur service. In its Preliminary Report, the Department of Commerce expresses concern over the effect of future non-Government use on the National Astronomy and Ionospheric Center, which operates a planetary research radar at Arecibo, Puerto Rico at 2380 MHz. To protect these radio astronomy operations, the Department of Commerce states that the 2390-2400 MHz band should not be used for airborne or space-to-Earth links, and that restrictions on terrestrial operations in the vicinity of the Puerto Rico planetary research radar facility may be necessary.[13]

6. The 2402-2417 MHz band is allocated internationally in Region 2 on a primary basis to the fixed, mobile, and radiolocation services, and on a secondary basis to the amateur service.[14] Domestically, the band is currently allocated on a secondary basis to the amateur service.[15] The 2402-2417 MHz band lies within the 2400-2500 MHz band that is available for use by industrial, scientific, and medical (ISM) applications.[16] Radio services operating within this band must accept harmful interference that may be caused by ISM devices, which include a large number of microwave ovens commonly used in households. In addition, the 2400-2483.5 MHz band is available domestically for use by equipment authorized under Part 15 of the Rules.[17]

7. Internationally, 4660-4685 MHz is allocated in Region 2 on a primary basis for fixed, fixed-satellite, and mobile services.[18] This band is allocated domestically on a primary basis for non-government fixed-satellite service space-to-Earth links, with use limited to international inter-continental systems.[19] However, there is currently no non-Government use of this band. An agreement with Canada requires that certain United States Government terrestrial line of sight and troposcatter systems be coordinated with Canada. This agreement also permits use of this band by airborne or other mobile stations but requires that such stations protect Canadian systems.[20]

## III. DISCUSSION

8. We are now considering allocating the spectrum at 2390-2400 MHz, 2402-2417 MHz and 4660-4685 MHz for new or developing services, or to provide spectrum to reaccommodate existing services. In response to our *NOI* initiating this proceeding we received a number of competing and generally mutually exclusive proposals and requests, many of which might benefit the public. Our principal objective in making this spectrum allocation decision is to ensure that the spectrum is put to its best and most valued use and that the greatest benefit to the public is attained. We believe that the way to achieve this goal is to adopt a broad and general allocation. Such an approach would allow for flexible use of these bands so that licensees would be able to offer a wide range of services employing varying technologies. This approach is similar to one taken in ET Docket No. 92-9, where we redesignated spectrum in the 2 GHz range for emerging technologies.[21] In that proceeding, we allocated 220 megahertz of spectrum to Fixed and Mobile services and identified it for use by emerging technologies. Later, we provided for the personal communications services (PCS) to use 140 megahertz of this spectrum. The remainder is available for future use.[22]

9. We therefore request comment on an allocation approach that would designate the 2390-2400 MHz, 2402-2417 MHz and 4660-4685 MHz bands for general Fixed and Mobile services, rather than specify these frequency bands for particular uses. In this context, we believe such a flexible allocation that relies substantially on market forces may be appropriate.[23] We also believe that under such an approach most of the services to be provided in this spectrum would likely meet the statutory

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[9] In the Conference Report on the Reconciliation Act the Conferees expressed their belief that low power biomedical telemetry devices may improve the quality and decrease the cost of health care services and stated that the NTIA and the FCC should consider the spectrum needs for such devices in making allocation decisions pursuant to the Reconciliation Act. In its comments, however, the Critical Care Telemetry Group states that biomedical telemetry devices must operate on frequencies below 1 GHz and that, therefore, none of the spectrum under consideration in this proceeding is appropriate for biomedical telemetry use. Critical Care Telemetry Group comments at 1-3.

[10] *See* Appendices B and C.

[11] *See* 47 C.F.R. 2.104(b)(2) for a description of Region 2.

[12] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106.

[13] Preliminary Report, section 4 at 14-17.

[14] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106.

[15] The Preliminary Report identified the 2400-2402 MHz band as being currently used for the Amateur Satellite Service and, therefore, did not identify this segment for reallocation. Preliminary Report at 4-16.

[16] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106. *See also* 47 C.F.R. Part 18.

[17] Part 15 provides for operation of unlicensed low-power devices.

[18] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106. Use of the fixed-satellite service (space-to-earth) at 4500-4800 MHz is subject to an allotment plan contained at Appendix 30B of the international Radio Regulations.

[19] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106. The fixed-satellite service in this band is also subject to case-by-case electromagnetic compatibility analyses. *See* U.S. allocation footnote 245.

[20] *See* Sharing Arrangement Between the Department of Communications of Canada and the National Telecommunications and Information Administration of the United States Concerning the Use of the Band 4400-5000 MHz, signed August 29, 1986.

[21] *See generally Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992), *Second Report and Order*, 8 FCC Rcd 6495 (1993), *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993), *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994).

[22] *See generally Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 5031 (1994).

[23] *See Amendment of Parts 2 and 22 of the Commission's Rules*, 2 FCC Rcd 1825 (1986) (subsequent history omitted).

criteria for auctions.[24] Therefore, we are proposing to make licenses for this spectrum available though competitive bidding, to the extent possible and practicable. We also believe it is important to provide for a market structure that provides for competition in the provision of new services. A competitive market structure would promote economical prices for users and provide operators with incentives to develop and introduce innovative service features and technologies. One approach for developing a competitive market structure would be to divide the spectrum into channel blocks of one to two megahertz. Licensees would be given exclusive use of these channels within a specified geographic area. We request comment on this approach and the appropriate amount of spectrum to specify for a channel block and the extent of the geographic areas to which channel blocks would be licensed.

10. We propose to allow technical flexibility in the provision of services. In particular, we propose to allow users freedom to choose the channelization, signal strength, modulation techniques and antenna characteristics they employ in providing service, consistent with not causing interference to other users. Interference to operations in adjacent service areas would be controlled through power limits at the service area boundaries. Licensees would also be free to negotiate and develop agreements for interference conditions at the boundaries between their service areas. We request comment on these proposals for the rules for technical operation. We particularly request comment on what the appropriate interference standards should be under such an approach. For personal communications services (PCS), we have adopted a standard that requires that the predicted or measured mean field strength at any location on the border of the PCS service area not exceed 47 dBuV/m unless the parties agree to a higher field strength.[25] We request comment on whether this standard would be appropriate for use in these bands.

11. While we believe that the above plan for allocation to Fixed and Mobile services would ensure that the spectrum is used for services that are most highly valued by the public, we also recognize that such an approach may be difficult to implement given certain factors that are unique to these bands. For example, there are incumbent amateur users in the 2390-2400 MHz and 2402-2417 MHz bands and the 2402-2417 MHz band is affected by emissions from ISM devices, including millions of household microwave ovens. In addition, a growing number of unlicensed Part 15 devices are also operating in this band. Accordingly, we believe it is appropriate also to solicit comment on identifying specific communications services as an alternative to relying only upon the general allocation. A number of such proposals were presented in the comments to the *NOI* and are discussed below.

12. In the 2390-2400 MHz band, In-Flight Phone Corporation (In-Flight) proposed an allocation for an aeronautical audio/visual service (AAVS). In-Flight's AAVS proposal has the potential to furnish commercial air travelers with real time video and audio information and entertainment services. According to In-Flight, the AAVS would be able to share spectrum with the Amateur and other services and, because it would be a ground-to-air service, would not present an interference problem for adjacent channel space research and radioastronomy operations.[26]

13. Another alternative for the 2390-2400 MHz band is a proposal from Southwestern Bell that this band be paired with the 2300-2310 MHz band and be used for wireless local loop service. As described by Southwestern Bell, a wireless local loop service would be enable a Local Exchange Carrier (LEC) to provide telephone service to the home via radio links rather than through a copper or fiber cable to each home. According to Southwestern Bell, the benefits of a wireless local loop service include reduced costs in providing telephone service to new customers, reduced telephone service maintenance costs, and rapid deployment of telephone service to new customers. Southwestern Bell further states that because of the high density of use in any particular area, a wireless local loop service would not be compatible with Amateur use of the spectrum.

14. We observe that this spectrum also could be used to provide unlicensed PCS or Multipoint Distribution Service (MDS). One possibility would be to provide unlicensed PCS services in either or both of the 2300-2310 MHz and 2390-2400 MHz bands.[27] Alternatively, the 2300-2310 MHz and 2390-2400 MHz bands could be used to accommodate the MDS currently operating at 2150-2160 MHz, freeing that spectrum for unlicensed PCS.[28]

15. There may also be benefit in using either the 2390-2400 MHz or the 2300-2310 MHz band for intelligent vehicle highway systems (IVHS). Motorola suggests that spectrum under consideration in this proceeding may be suitable for short range IVHS services.

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[24] Section 309(j)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j)(1), permits auctions only where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals. We also note that the Commission's authority under Section 309(j) to use competitive bidding is limited to awarding licenses and is not to be used for allocating spectrum.

[25] *See* 47 C.F.R. § 24.236.

[26] *See* comments of Cornell University and the National Research Council. These organizations stress the need for appropriate limits on use of the 2390-2400 and 2402-2417 MHz bands to protect highly sensitive radio astronomy operations being carried out on 2380 MHz at the Arecibo Observatory in Puerto Rico. In particular, these parties stress the need to not permit aeronautical or space-to-Earth use of the 2390-2400 MHz band, to restrict terrestrial use in the vicinity of the Arecibo Observatory, and to limit spurious emissions from equipment operating in these bands.

[27] We made a commitment to seek additional spectrum for unlicensed PCS in the PCS proceeding. *See Memorandum Opinion and Order*, GEN Docket No. 90-314, 9 FCC Rcd 5031 (1994).

[28] MDS currently operates in the 2150-2160 MHz band nationwide. This 10 megahertz provides one 6 megahertz wide channel and one 4 megahertz wide channel. In the top 50 markets, however, the 4 megahertz channel may be combined with 2 megahertz at 2160-2162 MHz. *See* 47 C.F.R. § 21.901(c). If we were to allocate 6 megahertz from each of the 2300-2310 MHz and 2390-2400 MHz bands, we could fully reaccommodate MDS. The remaining 4 megahertz in each band could be used for other purposes. As promised in the PCS Reconsideration MO&O, *supra* n.22, in the near future we will address in separate proceedings the specific issue of providing additional spectrum for unlicensed PCS and the mobile-satellite service.

16. In response to the *NOI*, we received several other suggestions for use of the 2390-2400 MHz band. These uses include interactive video in rural areas, low power communications, mobile-satellite service (MSS), and advanced private communications. We believe, however, that most of these uses are already adequately accommodated in other bands, could be accommodated under our general allocation proposal for these bands, or may not be suitable for the 2390-2400 MHz band. We request comments on our conclusions regarding these other alternatives. We invite comments on any other services that might be provided in this spectrum. Parties supporting alternative proposals for this band should address the compatibility of the proposed service with the Amateur and other services. Commenting parties should also provide a cost/benefit analysis for the service, along with specific information regarding operating parameters and any other relevant information. We also note that, while we have not specifically identified spectrum for advanced private communications as requested by the Coalition of Private Users of Emerging Multimedia Technologies (COPE), private users can receive service from commercial service providers and can compete in obtaining spectrum on the same basis as commercial providers. Additionally, we will continue to consider COPE's request for spectrum as we determine uses for additional spectrum being reallocated from Federal Government use under the Reconciliation Act.

17. Several of the alternatives for allocating the 2390-2400 MHz band discussed above also consider use of 2300-2310 MHz. The 2300-2310 MHz band was identified for reallocation in the Department of Commerce's Preliminary Report to be available in January 1996. However, in our August 9, 1994, report to the Secretary, U.S. Department of Commerce we suggested that this band be made available for private sector use immediately. Also, in the *NOI* in this proceeding, we requested comment on the benefits of pairing this band with the 2390-2400 MHz band. Because this band has only preliminarily been identified for reallocation, and is subject to change in the Department of Commerce's final report, we may request further comment later on the allocation of 2300-2310 MHz. Nevertheless, if we determine that it is in the public interest, we may allocate this band in the Report and Order in this proceeding adopting allocations for the 50 megahertz of spectrum already made available. Accordingly, we ask parties to comment on how we should allocate the 2300-2310 MHz band as well.

18. In the 2402-2417 MHz band, the presence of ISM equipment, unlicensed devices (particularly spread spectrum devices authorized under 47 C.F.R. § 15.247), and other non-Government users present a particularly challenging environment in which to implement new radio services. Any equipment operating in this band must use transmission schemes that are extremely robust and versatile. Commenters to our *NOI* indicate that many of the companies currently manufacturing unlicensed Part 15 equipment for the 902-928 MHz band have begun to develop or modify this equipment for use at 2400-2483.5 MHz and several firms are selling devices for use in this band. We also note that Part 15 use is consistent with a number of suggestions for use of this spectrum, such as in-building voice and data systems, and small area communications. All of these uses can be accommodated under Part 15 of our rules. In light of this we request comment on retaining future use of this band by Part 15 equipment. Possibilities include eliminating this band from Part 15 use in order to avoid any potential conflicts with future licensed services, maintaining Part 15 use of this band and also implementing licensed services, or maintaining Part 15 use of this band while limiting licensed use of the band.

19. We request further comment on other suggestions received for use of the 2402-2417 MHz band, including providing licensed services in this band that are subject to technical rules that are similar to the rules for unlicensed Part 15 devices, or use of the band for MSS. MSS providers appear pessimistic regarding the utility 2402-2417 MHz for MSS. However, Loral/Qualcomm states that it is continuing to evaluate the possibility of providing MSS in this band.

20. Both the 2390-2400 MHz and 2402-2417 MHz bands are currently available for secondary use by the amateur service. The Reconciliation Act directed the Department of Commerce to seek to avoid excessive disruption of the amateur service and to determine the extent to which, in general, commercial users could share the frequency with amateur radio licensees.[29] The Department identified spectrum for transfer in light of this directive, and concluded that these two bands could be made available for commercial use without severely affecting the amateur service. However, in their comments, the amateur service community argues that the Department failed to meet the criteria of the Reconciliation Act. We recognize the importance of the amateur service and, in making our allocation decisions, we will take into account existing use of the spectrum by the amateur service. We therefore solicit information on several options. One approach for accommodating amateur service use of these bands is to maintain a secondary allocation for the amateur service in all or part of this spectrum. Another approach is to make the amateur service the primary user in a portion of this spectrum while either maintaining a secondary allocation in the remaining portions of the bands or eliminating the other portions from the amateur service. We also solicit information on the degree of disruption to the Amateur service that would result if all or part of this spectrum was removed from the amateur service. We request comment on these options, including the ability of various radio services to share spectrum with the amateur service.

21. For the 4660-4685 MHz band, several parties representing broadcast interests request that we allocate t his band for broadcast auxiliary service (BAS). These parties state that broadcasters need additional spectrum to meet increasing needs for auxiliary communications, especially electronic news gathering. They argue that existing BAS spectrum is already congested and that advanced television and cable services will further increase demand. We request comment on this proposal and in particular the extent to which this band could accommodate both existing and new broadcast auxiliary requirements.

22. Other suggestions for use of the 4660-4685 MHz band include spectrum for fixed microwave systems that will be displaced from 1850-1990 MHz by PCS, MSS feeder links and in-building voice and data systems. We believe that the issue of reaccommodating fixed microwave operations has been adequately addressed in our proceeding on emerging

[29] Reconciliation Act § 6001(a)(3), as codified at 47 U.S.C. §§ 923(c)(1)(C)(iii) and 923(c)(3)(C).

technologies, so that is not necessary to reallocate additional spectrum for this purpose.[30] Further, while we recognize the importance of providing spectrum for MSS, including spectrum for feeder links, we note that the *Report of the MSS Above 1 GHz Negotiated Rulemaking Committee*, found that the existence of the FSS Allotment Plan for the 4500-4800 MHz band raises significant regulatory and policy issues regarding use of this band for feeder links.[31] With regard to the suggestion that 4660-4685 MHz be used for in-building communications and some limited outdoor use, we believe that such services can generally be accommodated in spectrum allocated for use by unlicensed PCS devices.[32] We request comment on our tentative conclusions regarding these alternative proposals.

23. We request comment on any other services that might be provided in these three frequency bands. Commenters should provide us with as much information as possible with regard to how any proposed service provides benefit to the public. Commenters should also describe their proposed service in as much detail as possible, including the most appropriate licensing areas, limitations on eligibility, and any technical constraints or parameters that should be imposed on use of these bands. Commenters should recognize that each band has slightly different circumstances that may affect its use and should address these circumstances appropriately. Commenters that support identifying specific services for these bands should discuss why this specificity is necessary and its impact upon future flexibility as technology continues to advance and new services become available. Parties should also provide a cost/benefit analysis for their proposal, and compare their proposal to other proposals under consideration. Finally, parties should discuss licensing mechanisms for the proposed service, including whether the service meets the criteria for competitive bidding.[33]

## IV. PROCEDURAL MATTERS

### Ex Parte Rules - Non-Restricted Proceeding

24. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

### Initial Regulatory Flexibility Analysis

25. The analysis required by the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendix E. §

### Comment Dates

26. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **December 19, 1994**, and reply comments on or before **January 3, 1995**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, DC 20554.

### Ordering Clause

27. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i), 303(g), 303(r), 332(a), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), 332(a), and 403.

### Contact Person

28. For further information concerning this proceeding, contact Steve Sharkey, Office of Engineering and Technology, (202) 653-8151.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[30] See generally, *Second Report and Order*, ET Docket No. 92-9, 8 FCC Rcd 6495 (1993), *Third Report and Order*, ET Docket No 92-9, 8 FCC Rcd 6589 (1993), and *Memorandum Opinion and Order*, ET Docket No. 92-9, 59 Fed Reg. 19642 (4/25/94).

[31] *Report of the MSS Above 1 GHz Negotiated Rulemaking Committee*, at 31.

[32] *See Memorandum Opinion and Order*, GEN Docket No. 90-314, 9 FCC Rcd 5031 (1994).

[33] Whether a service does or does not meet the criteria for competitive bidding will not be a factor in our allocation decision making process. This information will, however, assist us in judging the competitive nature of a service for the purpose of proposing licensing and service rules. We will offer licenses through competitive bidding if a service meets the criteria for doing so. *See* Section 309(j)(2) of the Communication Act of 1934, as amended. *See also* PP Docket No. 93-253.

## Appendix A

### NTIA Preliminary Spectrum Reallocation Plan

| Bands Identified for Reallocation | Reallocation Status | Reallocation Schedule |
|---|---|---|
| 1390-1400 MHz | Exclusive | January 1999 |
| 1427-1432 MHz | Exclusive | January 1999* |
| 1670-1675 MHz | Mixed | January 1999** |
| 1710-1755 MHz | Mixed | January 2004 |
| 2300-2310 MHz | Exclusive | January 1996 |
| 2390-2400 MHz | Exclusive | Immediate |
| 2402-2417 MHz | Exclusive | Immediate |
| 3650-3700 MHz | Mixed | January 1999 |
| 4635-4660 MHz | Exclusive | January 1997* |
| 4660-4685 MHz | Exclusive | Immediate |

* Protection for a limited number of facilities would be required for an additional period of time.

** Limited immediate use of this spectrum would be considered.

## Appendix B

**Comments filed in Response to NOI in ET Docket No. 94-32**

1 Alcatel Network Systems, Inc.
2 Amateur Television Network
3 Amateur Radio Council of Arizona
4 American Petroleum Institute
5 American Mobile Satellite Corporation
6 American Assoc. of State Highway and Transportation Officials
7 American Radio Relay League, Inc.
8 Apple Computer, Inc.
9 Association of Public-Safety Communications Officials-Inter
10 Association for Maximum Service Television, inc.
11 AT&T Corp.
12 California Public-Safety Radio Association, Inc.
13 Coalition of Private users of Multimedia Technologies
14 Cornell University/National Astronomy and Ionosphere Center
15 County of Kern
16 County of Orange, California
17 E. V. Williams Co., Inc.
18 First Nations Development Institute
19 Forestry-Conservation Communications Association
20 GEC Plessey Semiconductors
21 GTE Service Corporation
22 Herb D. Twitchell
23 Industrial Telecommunications Association, Inc.
24 Interdigital Communications Corp.
25 International Association of Chiefs of Police
26 Itron, Inc.
27 James W. Tittle
28 John Eramo & Sons, Inc.
29 Ken Bellmard
30 King County, Washington
31 Leaco Rural Telephone Cooperative, Inc.
32 Loral/Qualcomm Partnership, L.P.
33 Major Cities Police Chiefs Association
34 Maricopa Adult Probation Department
35 Motorola, Inc.
36 National Communications System
37 National Association of Business and Educational Radio, Inc.
38 New York City Transit Police Department
39 North Carolina Smartnet User's Network
40 Northern Amateur Relay Council of California, Inc.
41 Pacific Bell and Nevada Bell
42 Part 15 Coalition
43 Radio Amateur Satellite Corporation
44 Robert L. Greene
45 San Bernardino Microwave Society
46 Southern California Repeater and Remote Base Association
47 Southwestern Bell
48 Symbol Technologies, Inc.
49 Telecommunication Industry Association
50 The Critical Care Telemetry Group
51 The Southern Company
52 Utah VHF Society
53 Utilities Telecommunications Council
54 Valley Communications Center
55 Western Multiplex Corporation
56 Western States VHF-Microwave Society
57 William Burns

**Late filed Comments in ET Docket 94-32**

1 Cactus Intertie System/Cactus Radio Club, Inc.
2 City and County of Durham, North Carolina
3 County of Tulare
4 Florida Fruit & Vegetable Association
5 Kent Britain
6 Kerr-McGee Corporation
7 Mitchell Energy & Development Corp.
8 National Research Council
9 National Propane Gas Association
10 National Utility Contractors Association
11 Phelps Sungas, Inc.
12 Pillsbury Company
13 Ready Mix Concrete Corporation
14 Rochester VHF Group
15 Sun Services Corporation
16 Superior Asphalt Company, Inc.
17 Vann Gin Co., Inc.
18 Visalia Fire Department
19 Webber Energy Fuels
20 Westbank Electric, Inc.

### Appendix C

**Reply Comments filed in ET Docket No. 94-32**

1. Alcatel Network Systems
2. American Petroleum Institute
3. American Radio Relay League, Incorporated
4. AT&T Corp.
5. Capital Cities/ABC Inc.
6. COMSAT Corporation
7. Industrial Telecommunications Association, Inc.
8. International Business Machines Corporation
9. Loral/Qualcomm Partnership, L.P.
10. Metricom, Inc.
11. National Association of Broadcasters
12. National Broadcasting Company, Inc.
13. National Association of Business and Educational Radio, Inc.
14. Radio Amateur Satellite Corporation
15. Southwestern Bell Corporation
16. Western Multiplex Corporation

**Late Filed Reply Comments filed in ET Docket No. 94-32**

1. In-Flight Phone Corporation

### Appendix D

1. In the *NOI* in this proceeding, we requested information on potential services that could be accommodated in the 50 megahertz of spectrum at 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz that the Department of Commerce has identified for immediate reallocation. In response to our *NOI* we received 77 comments and 17 reply comments. This appendix provides a summary of these comments.

2. *2390-2400 MHz* The 2390-2400 MHz band lies within the 2300-2450 MHz frequency range, which is referred to as the 13 cm band by the amateur service community. The Department of Commerce has proposed reallocating 35 megahertz of spectrum, at 2300-2310 MHz, 2390-2400 MHz, and 2402-2417 MHz, out of the total 70 megahertz of spectrum currently available for use by the Amateur service in the 13 cm band.[1] This would leave 35 megahertz of spectrum remaining available for use by Amateurs on a secondary basis to Government operations.[2] Amateur service licensees contend that the Department of Commerce erred in identifying frequencies in this range for reallocation without accurately determining the effect that reallocation will have on the Amateur service, or to what extent commercial users could share the frequencies with the Amateur service.[3] These commenters dispute the Department of Commerce's assertion that Amateur service spectrum requirements can be satisfied by the 35 megahertz of spectrum that would remain allocated for use by the Amateur service in the 13 cm band. They state that the reallocation will leave insufficient spectrum for Amateur Satellite operations, will prevent full duplex point-to-point operations in the 13 cm band, will eliminate weak signal operations carried out in this band, and will crowd Amateur Service operations in the 13 cm band into the least desirable spectrum near the center of the ISM band at 2450 MHz.[4]

3. Many Amateur Service commenters state that sharing between commercial licensees and the Amateur Radio Service is not possible because, unlike Government users which are generally located in remote areas, commercial users are likely to be located in the same urban areas as Amateur radio users.[5] Amateur service commenters also point out that the Commission has used the continued availability to Amateurs of the 13 cm band to justify reallocating Amateur spectrum in lower bands to commercial services and that it would therefore be unjust for the Commission to now allocate this spectrum for commercial uses.[6] Accordingly, these commenters request that the frequencies reallocated from Federal Government use either be made available for the primary use of the Amateur radio service or that displaced Amateur Service users be accommodated in alternative bands.[7]

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[1] Preliminary Report at Section 5.

[2] The remaining 35 megahertz of spectrum is at 2400-2402 MHz and 2417-2450 MHz.

[3] Comments of Amateur Radio Council of Arizona at 2, American Radio Relay League, Inc. at 3-5, Northern Amateur Relay Council of California at 1-2, San Bernardino Microwave Society at 3, Southern California Repeater and Remote Base Association at 6-8 and 10-11, Utah VHF Society at 2, Cactus Intertie System/Cactus Radio Club, Inc. at 4-5. Sec. 113(c)(1)(C)(iii) of the Reconciliation Act requires that, in identifying whether a band of frequencies should be transferred to the private sector, the Department of Commerce consider "excessive disruption of existing use of Federal Frequencies by amateur radio licensees", and Sec. 113(c)(3)(C) states that the Department of Commerce must analyze the, "extent to which, in general, commercial users could share the frequency with amateur radio licensees."

[4] See Generally, comments of Amateur Television Network, Amateur Radio Council of Arizona, American Radio Relay League, Inc., Northern Amateur Relay Council of California, San Bernardino Microwave Society, Southern California Repeater and Remote Base Association, Utah VHF Society, and Radio Amateur Satellite Corporation.

[5] Amateur Television Network comments at 2; Amateur Radio Council comments at 2; Northern Amateur Relay Council of California comments at 3-5; Southern California Repeater and Remote Base Association comments at 8, 10-11; and Utah VHF Society comments at 2.

[6] American Radio Relay League comments at 11-12; SCRRBA comments at 12; and Cactus Intertie System/Cactus Radio Club comments at 5.

[7] A number of commenters have suggested that the Department of Commerce make available portions of the 2310-2390 MHz band for use by the Amateur Radio Service to accommodate displaced Amateur users or that the portions of 2300-2310 MHz band not be reallocated in exchange for spectrum above and adjacent to 2417 MHz. Reallocation of additional or alternative spectrum must be addressed by the Department of Commerce and is outside the scope of this proceeding. We note, however, that in our August 9th report to the Secretary of Commerce, FCC 94-213, we provided an analy-

4. A number of comments were received by manufacturers of equipment authorized under Part 15 of our Rules (Part 15 devices). Although the majority of these focused on the 2402-2417 MHz band, several parties discussed the potential for use of the 2390-2400 MHz band for unlicensed devices under Part 15 of the Rules or for licensed services subject to technical rules similar to the Part 15 rules. GEC Plessey suggests that the entire 2390-2417 MHz band be allocated for use by spread spectrum systems that could support services such as wireless wide-area networks and point-to-point services.[8] To provide compatibility between licensed and unlicensed services, GEC Plessey and AT&T suggest that we adopt technical rules for licensed services that are similar to the rules for unlicensed Part 15 devices.[9] However, Western Multiplex believes that restrictions stemming from a need to protect space research operations in adjacent spectrum would make it difficult to accommodate unlicensed operations in the 2390-2400 MHz band. Instead, Western Multiplex suggests that the 2390-2400 MHz band would be best used to support private mobile and fixed operations, possibly to fulfill some of the spectrum requirements described in the COPE petition.[10]

5. Pacific Bell and Nevada Bell (PB/NB) believe that while the 2390-2400 MHz band and the 2402-2417 MHz bands are too close to be paired and used for full duplex operations, the two megahertz separating the bands also makes it difficult to use them as a single band. PB/NB therefore believe that these bands would be best used for time division duplex operations,[11] to provide in-building voice and data systems and some limited outdoor use.[12] PB/NB notes the importance of paired operation for two way communication and, noting that the 2300-2310 MHz and the 2390-2400 MHz bands are the only bands identified in the Preliminary Report that can be easily paired, states that it would be appropriate to delay licensing the 2390-2400 MHz in order to allow it to be licensed with 2300-2310 MHz on a paired basis, possibly for public safety services.[13]

6. Southwestern Bell also urges that the 2390-2400 MHz and the 2300-2310 MHz bands be paired. It requests that these bands be allocated for use by local exchange telephone companies to provide wireless local loop service. Southwestern Bell states that such a service could replace wired local loops for providing basic telephone service and would facilitate the introduction of new technologies such as remote meter reading and rapid recovery systems for natural disasters.[14]

7. Leaco Rural Telephone Cooperative (Leaco) believes that the Commission has neglected its duty to consider rural areas in allocating spectrum for radio-based communications services and states that both the 2390-2400 MHz and 2402-2417 MHz bands are suited to providing interactive video, voice and data service in rural areas.[15] Several commenters also state that services to rural areas would be enhanced by allocating all, or most of, the 50 megahertz of spectrum for the exclusive use of Native Americans.[16]

8. Loral/Qualcomm and the American Mobile Satellite Corporation (AMSC) are evaluating the possibility of using the 2390-2400 MHz band for the Mobile Satellite Service (MSS).[17] AMSC states that, although the spectrum identified for reallocation has "very limited utility for MSS," it is analyzing the possible utility of the 2390-2400 MHz band for MSS downlinks. Further, in its comments in response to our *Notice of Inquiry* in preparation for the 1995 World Radiocommunications Conference, AMSC states that the 2390-2400 MHz band should be considered as a candidate for an MSS downlink allocation.[18] Loral/Qualcomm cites the Commission's previous recognition of the potential for the MSS service to stimulate economic growth as evidence of the relative importance of MSS to the future telecommunications infrastructure, and urges that the 2390-2400

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sis of comments received in response to the Preliminary Report along with our own comments and recommendations for consideration by the Department of Commerce for incorporation in its final report.

[8] GEC Plessey comments at 1-3. GEC Plessey suggests that the 2400-2402 MHz band be included in the reallocation of spectrum. Such a reallocation is outside the scope of this proceeding.

[9] GEC Plessey comments at 1-2, AT&T comments at 3-4.

[10] Western Multiplex comments at 3-4. Western Multiplex also provides a band plan for the 2390-2400 MHz band. The COPE petition is a Petition for Rule Making, filed December 23, 1993, by the Coalition of Private Users of Emerging Multimedia Technologies (COPE) that has been included for consideration in this proceeding. COPE is a group consisting of a broad range of private land mobile users and user associations, such as the American Petroleum Institute, the Association of Public-Safety Communication Officials-International, Inc., the National Association of Business and Educational Radio, Inc., and the Utilities Telecommunications Council. In its petition, COPE argues that a need exists for an allocation of 75 megahertz of spectrum below 3 GHz for the development of an "Advanced Private Land Mobile Communications Service", which would accommodate the needs of private land mobile radio user communities for new operations such as advanced wireless imaging and decision processing/remote file access systems. COPE specifically suggests that spectrum be reallocated from the Federal Government, and it states that the most likely source of spectrum to accommodate private emerging technology needs lies in the spectrum to be reallocated under the requirements of the Reconciliation Act.

[11] Time Division Duplex operations provide two-way communications by transmitting in only a single direction at any moment in time. This is compared to Frequency Division Duplex where bands of frequencies that are sufficiently separated are paired to allow simultaneous, bi-directional communications.

[12] Pacific Bell and Nevada Bell comments at 4.

[13] Pacific Bell and Nevada Bell comments at 2-3, 6.

[14] Southwestern Bell comments at 1-7.

[15] Leaco comments at 3-9. Contrary to Leaco's contention that we have not fulfilled our obligation to rural telephone companies, in adopting rules for competitive bidding we have included these companies as designated entities that receive bidding preferences. *See Generally*, PP Docket No. 93-253.

[16] Comments of First Nation Development Institute, Ken Ballard, and Robert L. Greene. These commenters do not, however, describe what services the spectrum should be used for or how Native Americans would use the spectrum outside of remote areas. We decline to propose to set this spectrum aside for exclusive use by Native Americans. In our recent decision to auction spectrum for PCS and IVDS we made specific provisions to assist minorities in obtaining licenses. *See Generally*, PP Docket No. 93-253. If we find that similar provisions are warranted in issuing licenses for spectrum reallocated from the Federal Government we will take such action.

[17] Loral/Qualcomm comments at 5, AMSC comments at 1-2.

[18] AMSC comments filed in response to the *Notice of Inquiry*, IC Docket No. 94-31 at 15-16.

MHz and 2402-2417 MHz bands be allocated for MSS uplinks.[19] However, AMSC states that these bands would have no utility for providing MSS uplinks because of interference from ISM devices and Part 15 equipment operating in the 2400-2500 MHz band.[20] Motorola also urges consideration for the possible use of this spectrum for MSS[21] and COMSAT has filed reply comments also supporting use of this spectrum for MSS.[22]

9. A number of comments were received in support of the Petition for Rule Making from COPE. In its comments, COPE requests that the 2390-2400 MHz band be allocated for advanced private communications services.[23] The Utilities Telecommunications Council (UTC), the Association of Public-Safety Communications Officials (APCO), and the Forestry-Conservation Communications Association filed separate comments expressing their belief that the 2390-2400 MHz band can be used to satisfy private emerging technology spectrum requirements for advanced mobile or fixed communications.[24] The Industrial Telecommunications Association, Inc. (ITA) argues that the 2390-2400 MHz band is more suitable for private rather then commercial systems because the area and intensity of use of privately operated systems is generally more controlled than commercial systems and would be able to accommodate any restrictions imposed due to Government operations in adjacent bands.[25] On the other hand, a number of commenters believe that, because of the existing non-Government use (e.g., amateur use), restrictions on potential use, or the frequency range of the bands, none of the spectrum being considered in this proceeding is suitable for use by private users for emerging technologies.[26]

10. In late filed reply comments, In-Flight Phone Corporation (In-Flight) seeks to have the 2390-2400 MHz band allocated for use by an aeronautical audio/visual service (AAVS). In-Flight states that AAVS would be a ground-to-air service that would provide live multi-channel audio and video programming for airline passengers. In-Flight contends that the 10 megahertz of spectrum at 2390-2400 MHz could provide four channels of live video and 18 channels of live audio entertainment to the average 1.36 million people that fly on commercial aircraft each day.[27]

11. *2402-2417 MHz* The 2402-2417 MHz band also lies within the Amateur service 13 cm band. Amateur comments regarding reallocation of portions of the 13 cm band have already been discussed in the preceding paragraphs,[28] and the points made with regard to reallocation of 2390-2400 MHz apply to this band as well.

12. Several manufacturers of Part 15 devices submitted comments concerning this band, noting the variety and importance of devices developed under Part 15. The Part 15 Coalition points out that such devices include "digital cordless telephones, electronic article surveillance equipment, utility metering devices, fire and security alarm devices, wireless bar code readers, airborne and marine collision avoidance systems, local area networks..."[29] Other commenters note that the 2400-2500 MHz band is allocated internationally for ISM use and that, consequently, Part 15 devices manufactured in the United States can be marketed abroad, adding to the international competitiveness of U.S. companies.[30] Generally, the commenters note that it was only recently that the Commission encouraged development of spread spectrum systems in the 902-928 MHz, 2400-2483.5 MHz, and the 5700-5825 MHz bands and argued that the Commission should not now allocate 2402-2417 MHz for services that would be incompatible with continued Part 15 development and use of the 2400-2483.5 MHz band.[31]

13. There is some disagreement, however, on what uses would be incompatible with Part 15 use of the 2402-2417 MHz band. Apple, Interdigital, the Part 15 Coalition, the Southern Company, and Western Multiplex argue that any commercial licensed service would be incompatible with Part 15 operation and that 2402-2417 MHz should not, therefore, be considered for any licensed service.[32] Other commenters, on the other hand, believe that Part 15 operations are compatible with some licensed services. Symbol Technologies states that spread spectrum Part 15 devices are compatible with virtually all conventional narrowband services.[33] GEC Plessey suggests that 2400-2402 MHz also be reallocated from Federal Government to private sector use and that the entire 2390-2417 MHz band then be allocated for use by spread spectrum systems that could support services such as wireless wide-area networks, and point-to-point systems, including telephony trunks.[34] To provide compatibility between licensed and unlicensed services, GEC Plessey and AT&T wouldadopt technical rules for licensed services that are similar to the rules for unlicensed Part 15 devices.[35]

14. PB/NB believes that the 2402-2417 MHz band would be best used for time division duplex operations to provide in-building voice and data systems and some limited out-

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[19] Loral/Qualcomm comments at 1-5.
[20] AMSC comments at 1-2.
[21] Motorola comments at 10.
[22] COMSAT reply comments at 1-2.
[23] COPE comments at 4-6.
[24] UTC comments at 6-7, APCO comments at 5-6, Forestry-Conservation Communications Association comments at 2.
[25] ITA comments at 4-7.
[26] Comments of California Public-Safety Radio Association at 3, County of Orange, California at 2, International Association of Chiefs of Police at 4-7, King County, Washington at 1, Major Cities Police Chiefs Associations at 3, New York Transit Police Department at 1, Telecommunications Industry Association at 5-6, Valley Communications Center at 1.
[27] In-Flight reply comments at 8.
[28] Paras. 6-7, *supra*.
[29] Part 15 Coalition comments at 2.
[30] Apple Computer comments at 3; AT&T comments at 3; and GEC Plessey comments at 2-3
[31] In 1990, we encouraged the further development and implementation of the "exciting new family of [spread spectrum] technologies" by modifying Part 15 of the Rules to maximize the flexibility of spread spectrum devices. Spread spectrum systems may operate with up to one watt of transmitter output power. *Report and Order*, Gen. Docket No, 89-354, 5 FCC Rcd 4123, 4124 (1990).
[32] Apple comments at 1-3; Interdigital comments at 4; Part 15 Coalition comments at 3-4; Southern Company comments at 6-7; Western Multiplex comments at 5-7.
[33] Symbol Technologies comments at 8-9.
[34] GEC Plessey believes that such terrestrial use would have a minimal effect on Amateur Satellite operations at 2400-2402 MHz. GEC Plessey comments at 1-3.
[35] GEC Plessey comments at 1-2, AT&T comments at 3-4.

door use.[36] Loral/Qualcomm states that it is evaluating the possibility of using 2402-2417 MHz for an MSS uplink.[37] AMSC, however, believes that the noise generated by ISM equipment operating in this band eliminates it consideration for MSS use, especially as an uplink.[38]

15. Parties that filed comments in support of allocating the 2390-2400 MHz band to meet the advanced communications needs of private radio users, as described in the COPE petition, generally also supported allocating the 2402-2417 MHz band for this purpose.[39] APCO states that any difficulty in using this band arising from noise from ISM devices could be overcome through geographic limitations, higher power levels, or the use of spread spectrum technology.[40]

16. *4660-4685 MHz* Alcatel Network Systems (Alcatel) believes that the 4660-4685 MHz band is suitable for non-Government use by the fixed microwave service. Alcatel contends, however, that an additional 75 megahertz of spectrum is needed to meet the needs of fixed microwave users and that 100 megahertz of spectrum should be reallocated.[41] API, and the American Association of State Highway and Transportation Officials (AASHTO), believe that this band should be allocated for the use of private fixed microwave systems that will be displaced from the 1850-1990 MHz band by PCS.[42] The Forestry-Conservation Communications Association, the National Association of Business and Educational Radio, Inc. (NABER), and Western Multiplex also believe thatprivate users can make some use of this band.[43] However, most parties filing comments in support of the COPE petition regard the 4660-4685 MHz band as too high in the spectrum to meet the needs of private users for advanced mobile services.

17. As with the 2390-2400 MHz and 2402-2417 MHz bands, PB/NB believe that the 4660-4685 MHz band would be best used for time division duplex operations to provide in-building voice and data systems and possibly some limited outdoor use.[44] Loral/Qualcomm suggests using the 4660-4685 MHz band for MSS service links or feeder links, in either the space-to-Earth or Earth-to-Space direction.[45] COMSAT supports using this band for non- geostationary satellite system feeder links.[46]

18. The Association for Maximum Service Television (MSTV) believes that the 4660-4685 MHz band would be appropriate for support of wideband advanced digital video services and proposes that the band be allocated to terrestrial fixed and mobile auxiliary broadcast operations.[47] MSTV states that increased use of broadcast auxiliary services, particularly for mobile electronic news gathering (ENG) operations, has resulted in congestion in the bands that are currently available for such operations. Further, MSTV asserts that demand for broadcast auxiliary spectrum routinely surpasses the amount of spectrum that is available, especially in major metropolitan areas. MSTV argues that the added spectrum requirements of advanced television (ATV) will result in even greater spectrum congestion. Accordingly, MSTV argues that the 4660-4685 MHz band should be allocated to meet the growing demands of the broadcast auxiliary service.[48] MSTV's proposal is supported by Capital Cities/ABC, Inc. (ABC), the National Association of Broadcasters (NAB), and the National Broadcasting Company, Inc. (NBC), and is opposed by the American Petroleum Institute, and NABER.[49]

## Appendix E

### INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. **Reason for Action:** The changes to Part 2 of the Commission's Rules proposed herein are for use of the spectrum that is being reallocated from Federal Government to non-Government use. This reallocation of spectrum is required by the Omnibus Budget Reconciliation Act of 1993.

2. **Objectives:** The Commission seeks to allocate the spectrum for services that present the greatest potential to provide benefit to the public by providing for the introduction of new services and the enhancement of existing services. These new and enhanced services will create new jobs, foster economic growth, and improve access to communications by industry and the American public.

3. **Legal Basis:** The legal basis for these rule changes is found in Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

4. **Reporting, Recordkeeping, and Other Compliance Requirements:** No reporting, recordkeeping, or other compliance requirements are proposed in this item.

5. **Federal Rules Which Overlap, Duplicate or Conflict With These Rules:** None.

6. **Description, Potential Impact, and Number of Small Entities Involved:** Many small entities could be positively affected by this proposal because the allocations proposed will foster new technologies resulting in new jobs, economic growth, and improved access to communications by industry, including small entities. The number of small entities that will be affected is unknown.

7. **Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:** This Notice of Proposed Rule Making solicits comments on a variety of alternatives. Additionally, all significant alter-

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[36] Pacific Bell and Nevada Bell comments at 4.
[37] Loral/Qualcomm comments at 5.
[38] AMSC comments at 1-2.
[39] COPE comments at 4-6, UTC comments at 6-7, APCO comments at 5-6, Forestry-Conservation Communications Association comments at 2.
[40] APCO comments at 5-6.
[41] Alcatel comments at 1-3.
[42] API comments at 17. ASSHTO comments at 3.
[43] Forestry-Conservation Communications Association comments at 1-2 and 5. NABER at comments 16. Western Multiplex comments at 7.
[44] Pacific Bell and Nevada Bell comments at 5.
[45] Loral/Qualcomm comments at 6.
[46] COMSAT reply comments at 2.
[47] MSTV comments at 6-7.
[48] MSTV also points out that allocating this band for auxiliary services offers the potential for future expansion of broadcast auxiliary services in the adjacent 4635-4660 MHz band, which was identified for reallocation in the Preliminary Report and is to be available in 1997. MSTV comments at 2-8.
[49] Reply comments of ABC at 1-4, NAB at 1-4, NBC 1-4, API at 8-9, and NABER at 4-5.

natives presented in response to the *Notice of Inquiry* in this proceeding have been addressed in this Notice of Proposed Rule Making.

## Appendix F

A. Title 47 Code of Federal Regulations, Part 2, is proposed to be amended as follow:

**PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AN REGULATIONS**

1. The authority citation for Part 2 continues to read as follows:

**Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 30, 303, 303(r), and 307, unless otherwise noted.**

2. Section 2.106 is amended by revising columns 4 through 7 of the table for the frequencies 2390-2450 MHz and 4500-4800 MHz, revising footnote G2, and adding new footnote G122, and to read as follows:

* * * * *

| United States table | | FCC use designators | |
|---|---|---|---|
| Government | Non-Government | Rule part(s) | Special-use frequencies |
| Allocation MHz | Allocation MHz | | |
| (4) | (5) | (6) | (7) |
| 2390-2400<br><br><br>G122 | 2390-2400<br>FIXED.<br>MOBILE.<br>Amateur. | Amateur (97). | |
| 2400-2402<br>RADIOLOCATION.<br>664 752 G2 | 2400-2402<br>Amateur.<br>664 752 | Amateur (97). | |
| 2402-2417<br><br><br>664 752 G122 | 2402-2417<br>FIXED.<br>MOBILE.<br>Amateur.<br>664 752 | Amateur (97). | |
| 2417-2450<br>RADIOLOCATION.<br>664 752 G2 | 2417-2450<br>Amateur.<br>664 752 | Amateur (97). | |

* * *

| | | | |
|---|---|---|---|
| 4500-4660<br>FIXED.<br>MOBILE.<br><br>US245 | 4500-4660<br>FIXED-SATELLITE<br>(space-to-Earth).<br><br>792A US245 | | |
| 4660-4685<br><br><br><br>G122 | 4660-4685<br>FIXED.<br>FIXED-SATELLITE<br>(space-to-Earth).<br>MOBILE.<br>792A US245 | | |
| 4685-4800<br>FIXED.<br>MOBILE.<br><br>US245 | 4685-4800<br>FIXED-SATELLITE<br>(space-to-Earth).<br><br>792A US245 | | |

* * *

G2 In the bands 216-225, 420-450 (except as provided by US 217), 890-902, 928-942, 1300-1400, 2300-2390, 2400-2402, 2417-2450, 2700-2900, 5650-5925, and 9000-9200 MHz, the Government radiolocation is limited to the military services.

* * *

G122 The bands 2390-2400, 2402-2417 and 4660-4685 MHz were identified for immediate reallocation, effective August 10, 1994, for exclusive non-Government use under Title VI of the Omnibus Budget Reconciliation Act of 1993. Effective August 10, 1994, any Government operations in these bands are on a non-interference basis to authorized non-Government operations and shall not hinder the implementation of any non-Government operations.

* * * * *

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Report to
Ronald H. Brown
Secretary, U.S. Department of Commerce
Regarding the
Preliminary Spectrum Reallocation Report

By the Commission:

**Adopted: August 9, 1994; Released: August 9, 1994**

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## I. INTRODUCTION

1. One year ago, Congress directed the Secretary of Commerce to identify at least 200 megahertz of spectrum currently allocated on a primary basis for Federal Government use which is not required for present or identifiable future use by the Federal Government, and which is most likely to have the greatest potential for productive uses and public benefit if allocated for non-Federal use. On February 10, 1994, the Secretary of Commerce released its Preliminary Spectrum Reallocation Report (Preliminary Report)[1] identifying spectrum for reallocation from Federal Government use to private sector, including local government, use. The public was then afforded an opportunity to comment on the Preliminary Report. In general, parties filing comments praised NTIA for its efforts in preparing the Preliminary Report, but stated that the proposals require modifications to better satisfy the public's spectrum requirements. This report provides an analysis of the comments, a discussion of possible alternative bands of spectrum, and a supplemental spectrum reallocation plan that we believe would enhance dramatically the viability of the reallocated spectrum for commercial and local governmental use.[2]

2. Although the Department of Commerce has complied with the requirements enacted by Congress, we believe that considering possible changes to the reallocation plan presented in the Preliminary Report could result in even greater benefits to the public. In preparing its final report we request NTIA to seek to provide the large blocks of spectrum required to accommodate high volumes of communications and the wide bandwidths necessary to transmit communications such as video. The private sector would also benefit from access to blocks of spectrum that can be readily paired and used to accommodate emerging technologies such as mobile satellite service.

## II. BACKGROUND

3. The Omnibus Budget Reconciliation Act of 1993[3] (Reconciliation Act), which was signed into law on August 10, 1993, requires that the Secretary of Commerce identify at least 200 megahertz of spectrum currently allocated for use by Federal Government agencies, for transfer to the FCC for use by the private sector.[4] All of the 200 megahertz of spectrum recommended for reallocation must be located below 5 gigahertz, with at least 100 megahertz of this being below 3 gigahertz.[5] The Reconciliation Act required that the Secretary of Commerce issue a report within six months of the date of its enactment that makes a preliminary identification of reallocable bands of frequencies that meet criteria established by the Act. The Reconciliation Act further required the Secretary of Commerce to identify 50 megahertz of the 200 megahertz of spectrum that can be made available for reallocation immediately upon issuance of the preliminary report.[6] At least one-half of the 50 megahertz identified for immediate reallocation must be below 3 gigahertz and all of it must be identified for exclusive non-Federal use. The President must withdraw the assignment to a Federal Government station of any frequency recommended for immediate reallocation within 6 months of release of the preliminary report so that the spectrum is then available for exclusive non-Federal use.[7]

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[1] NTIA Special Publication 94-27.

[2] This report satisfies Title VI, Section 113(d)(3) of the Omnibus Budget Reconciliation Act of 1993, which requires that the Federal Communications Commission submit to the Secretary of Commerce an analysis of comments, along with any comments or recommendations it deems appropriate, filed in response to the Department of Commerce's preliminary report identifying spectrum for reallocation from Federal Government use to private sector use.

[3] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6001(a)(3), 107 Stat. 312 (approved August 10, 1993); *see also* H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. (1993).

[4] The Communications Act of 1934 authorized the FCC to assign frequencies to all radio stations in the United States except those belonging to the Federal Government. Use of the term "private sector" refers to commercial entities, private entities, local governments, and public safety organizations. Section 305 of the Communications Act, 47 U.S.C. § 305, authorizes the President to assign frequencies to Federal Government stations. This authority has been delegated to the Assistant Secretary of Commerce for Communications and Information (who is also the Administrator of the National Telecommunications and Information Administration). *See* Pub. Law 102-538, 106 Stat. 3533 (1992).

[5] The Reconciliation Act permits up to 100 megahertz of the spectrum recommended for reallocation to be retained for some use by Federal Government stations provided that the Government use is limited to substantially less than the potential use to be made by non-Government stations (this would be considered "mixed use" spectrum). Reconciliation Act § 113(b).

[6] Reconciliation Act § 113(e)(2)(A).

[7] *i.e.*, by August 10, 1994. The Reconciliation Act does contain a provision whereby the President can substitute alternative

4. In compliance with the timing requirements of the Reconciliation Act, on February 10, 1994, the Department of Commerce released its report making a preliminary identification of spectrum for reallocation.[8] The frequency bands, including conditions on use, that Commerce has identified for reallocation are listed in Table 1.

5. The Reconciliation Act provided a 90 day period from the release of the Preliminary Report during which interested parties could file comments with the Secretary of Commerce regarding the report and its recommendations. That 90 day period ended May 11, 1994. A total of 47 comments were filed, copies of which were provided to the FCC by the Department of Commerce.[9] The Reconciliation Act requires that, 90 days from the end of the public comment period, the Commission submit to the Secretary of Commerce an analysis of the public comments, along with any comments or recommendations it deems appropriate. The Department of Commerce is to consider the public comments and the Commission's report and, is required to submit to the President and Congress a final report identifying and recommending spectrum for reallocation by February 10, 1995.[10]

## III. ANALYSIS OF COMMENTS

6. A total of 47 parties filed comments in response to the Preliminary Report. These comments can be divided into four general groups; 1) federal agencies, 2) amateur radio service licensees and organizations, 3) manufacturers and users of equipment authorized under Part 15 of the Commission's rules, and 4) other commercial and local government interests. A list of commenters is attached as Appendix A. The commenters discussed the frequency bands proposed for reallocation as well as the process NTIA followed to arrive at the proposals.

frequencies if he determines that: 1) the reassignment would jeopardize the national defense interests, 2) the frequency proposed for reassignment is uniquely suited to meeting important governmental needs, 3) the reassignment would seriously jeopardize health or safety, 4) the reassignment will result in costs in costs the Federal Government that are excessive in relation to the benefits that may be obtained from commercial or other non-Federal uses, or 5) the reassignment will disrupt the existing use of a Federal Government band of frequencies by amateur radio licensees. *See* Reconciliation Act § 114.

[8] Preliminary Spectrum Reallocation Report, U.S. Department of Commerce, NTIA Special Publication 94-27, February, 1994 (Preliminary Report).

[9] Five of the commenters, the Florida Department of Transportation, the U.S. Department of Justice, the Maine Turnpike Authority, the National Hydrologic Warning Council, and the Department of Energy, filed comments after the May 11, deadline. These comments will, however, still be considered.

[10] *See* Reconciliation Act § 113.

**Table 1**
**NTIA Preliminary Spectrum Reallocation Plan**

| Bands for Reallocation | Amount (MHz) | Reallocation Status | Availability | Conditions on Non-Government Use |
|---|---|---|---|---|
| 1390-1400 MHz | 10 | Non-Government only | January 1999 | No space-to-Earth links; adjacent to high-power radar; Receiver standards recommended |
| 1427-1432 MHz | 5 | Non-Government only | January 1999 | No airborne or space-to-Earth links |
| 1670-1675 MHz | 5 | Mixed[1] | January 1999 | No airborne or space-to-Earth links |
| 1710-1755 MHz | 45 | Mixed[1] | January 2004 | Extensive continued Government operations |
| 2300-2310 MHz | 10 | Non-Government only | January 1996 | No airborne or space-to-Earth links; Amateur allocation |
| 2390-2400 MHz | 10 | Non-Government only | Immediate | No airborne or space-to-Earth links; Amateur allocation |
| 2402-2417 MHz | 15 | Non-Government only | Immediate | ISM band; Part 15 band; Amateur allocation |
| 3650-3700 MHz | 50 | Mixed[1] | January 1999 | Adjacent to high power radar; receiver standards recommended |
| 4635-4660 MHz | 25 | Non-Government only | January 1997 | Satellite use limited by Appendix 30B |
| 4660-4685 MHz | 25 | Non-Government only | Immediate | Satellite use limited by Appendix 30B |
| **Total** | 200 | | | |

1 Partially retained for use by Federal Government stations provided that such use is substantially less than potential non-Government use.

**Government Agencies**

7. Comments were received from sixteen Government agencies. They focused on the impact that would result from reallocation of the spectrum identified in the Preliminary Report. No agency opposed reallocation of the proposed bands. However, a number of agencies noted that imposition of conditions on non-Government use of certain bands is critical to protect Government operations on adjacent bands. This is especially true for agencies performing space services, such as the National Aeronautics and Space Administration (NASA), the National Research Council (NRC), and Cornell University and The National Astronomy and Ionosphere Center (Cornell). One or all of these organizations stressed the need to prevent use of the 1390-1400 MHz, 1427-1432 MHz, 1670-1675, MHz, 1710-1755 MHz, 2390-2400, and 2402-2417 MHz bands for Space-to-Earth links or aeronautical applications.[11] Agencies also stressed the need to maintain the delayed reallocation schedule for certain frequency bands and the need to continue use of some Government facilities as proposed in the Preliminary Report.[12] Some agencies that will be affected by reallocation of the proposed spectrum provided estimated costs associated with the requirement to move operations to other bands or to find alternate methods of meeting the agency's requirements (e.g., communicate via leased lines, or obtain service from a commercial provider).[13] No Government Agencies proposed alternative bands for reallocation.

**Amateur Service**

8. Fifteen comments were received by licensees and organizations associated with the amateur radio service. These commenters uniformly oppose reallocation of the 2300-2310 MHz, 2390-2400 MHz, and 2402-2417 MHz bands because of the potential impact on amateur operations. These bands are currently allocated for use by the amateur radio service on a secondary basis to government services. Although commenters concur with the Preliminary Report's assertion that these bands are not as heavily used as lower frequency bands available to the Amateur service, they also contend that use of these bands is increasing and that there are a number of existing operations that will be affected by reallocating the spectrum.

9. Current amateur service uses of this band include amateur television repeaters. The Chief of Police of the City of Martinez, California, states that an amateur television repeater in the San Francisco region currently serves emergency agencies and argues that reallocation of the spectrum in the 2.4 GHz band from the amateur service would have a negative impact on public safety.[14] In addition, commenters state there are a number of amateur radio point-to-point microwave links operating in these bands in the southwestern United States[15] and that these links provided vital communications during the Los Angeles earthquake earlier this year when normal telephone service was disrupted.[16] Commenters also indicate that there are more than 200 weak-signal amateur radio stations in operation in the United States.[17] These stations receive very weak signals that are transmitted over long distance using a variety of propagation methods and are extremely susceptible to interference.

10. Entities filing comments dispute the Preliminary Report's contention that amateur service requirements could be accommodated in the remaining 35 megahertz of spectrum in the 2400-2402 MHz and 2417-2450 MHz bands that would still be available to the amateur service on a secondary basis to Federal Government operations. Most amateur service microwave links use frequencies in the 2300-2310 MHz band paired with frequencies in the 2390-2400 MHz band in accordance with a band plan adopted by SCRRBA. Commenters state that continued point-to-point microwave operations require paired frequencies separated by at least 40 megahertz but less than 140 megahertz, and that under the Preliminary Report's reallocation plan it would not be possible to accommodate such use.[18] In addition, weak signal operations require approximately 1 megahertz of uncluttered spectrum. Under the SCRRBA band plan, these operations are currently located in the 2303.75-2304.75 MHz band. SCRRBA states that weak signal operations require uncluttered spectrum and that these operations cannot share spectrum with the Amateur-satellite service operations in the 2400-2402 MHz band and cannot operate in the noisy 2417-2450 MHz band.[19]

11. Commenters also state that the 2400-2402 MHz band is insufficient to accommodate planned Amateur service satellite operations. They point out that, because the Amateur satellite service generally uses low earth orbit satellites, effective development of Amateur satellite operations requires world-wide allocations. Modifying the allocation in the U.S. could, therefore, have a negative impact on Amateur-satellite service operations around the world.[20] Commenters further contend that at least 10 megahertz of spectrum is needed at 2400-2410 MHz to provide a matched downlink band to the 10 megahertz uplink band in the 1260-1270 MHz band. Additional downlink spectrum may also be required in this band to match uplink

[11] NASA comments at Attachment 2, NRC comments at 5 and 11-14, Cornell comments at 3-5. It is unclear from these comments whether NRC and Cornell seek to prevent use of the entire 1710-1755 MHz band for Space-to-Earth links and aeronautical applications. Both commenters single out the 1718.8-1722.2 MHz band, which contains the fourth transition of the ground state of the OH radical, for protection, but state that airborne and space-to-Earth stations should be prohibited in this band and "adjacent bands." NRC at 13, Cornell at 5.

[12] *See* comments of the National Oceanic and Atmospheric Administration regarding use of the 1670-1675 MHz, and 1710-1755 MHz bands, and comments of the National Communications System at 3-4 regarding delayed reallocation of the 1710-1755 MHz band.

[13] *See* comments of the National Aeronautics and Space Administration, Department of the Army, Department of the Treasury, Department of the Interior, National Oceanic and Atmospheric Administration, Department of Agriculture, Department of Justice, and Department of Energy.

[14] City of Martinez, California, Chief of Police comment at 1-2.

[15] The Southern California Repeater and Remote Base Association (SCRRBA) database shows 22 conventional medium bandwidth point-to-point terminals and 10 Digital narrowband terminals. SCRRBA comments at 5.

[16] San Bernardino Microwave Society, Inc. comments at 4, Southern California Repeater and Remote Base Association comments at 3, Amateur Radio Council of Arizona comments at 1.

[17] American Radio Relay League comments at 14.

[18] SCRRBA comments at 8.

[19] SCRRBA comments at 8.

[20] Radio Amateur Satellite Corporation comments at 3-12.

spectrum in the 3400-3410 and 5650-5670 MHz bands.[21] Finally, the commenting parties note that the proposed reallocation will crowd Amateur service users into the least desirable spectrum in the 2417-2450 MHz band.[22] This spectrum is less desirable because, the 2417-2450 MHz is at the center of the 2400-2500 MHz band available for use by Industrial, Scientific, and Medical devices and is noisier than the 2400-2417 MHz band.[23]

12. Several Amateur service commenters provide suggestions as to how the Department of Commerce could lessen the impact of reallocation on the Amateur service. The San Bernardino Microwave Society suggests identifying the 2417-2422 MHz band for reallocation rather than the 2300-2305 MHz band and giving the Amateur service primary status for use of the 2300-2305 MHz band.[24] The SCRRBA requests that the reallocation proposal be modified to retain the 2303.75-2304.75 MHz band for weak signal use, and that amateur point-to-point operations displaced by the spectrum reallocation be accommodated by allocating two 6-megahertz bands for amateur point-to-point use in the 2310-2390 MHz band. If the Department of Commerce reconsiders reallocating portions of the amateur service bands identified in the Preliminary Report, SCRRBA proposes that, if necessary, the Department of Commerce could make up for a spectrum short-fall by substituting a like amount of spectrum between 2417-2425 MHz.[25] The ARRL proposes allocating spectrum in the 2360-2390 MHz band to accommodate Amateur operations displaced by the proposed reallocation.[26]

**Part 15 Manufacturers**

13. Comments were filed by three companies that manufacture equipment used on an unlicensed basis as authorized under Part 15 of the Commission's rules. These commenters focus on the 2402-2417 MHz band, which is already available for private use under Part 15 of our Rules.[27] In 1985 the Commission amended Part 15 of the Rules to permit development and use of spread spectrum systems in the bands 902-928 MHz, 2400-2483.5 MHz, and 5725-5850 8MHz with up to 1 watt transmitter output power.[28] In 1990, to further encourage the development and implementation of this "exciting new family of technologies" the Commission modified Part 15 of its rules to maximize the flexibility and broaden the opportunities for spread spectrum devices.[29] Our attempts to encourage this development have been successful and today millions of Part 15 spread spectrum devices provide a wide variety of communications services as well as services such as automated meter reading, inventory control, package tracking and shipping control, alarm devices, local area networks, and cordless phones. Although the majority of Part 15 spread spectrum devices currently operate in the 902-928 MHz band, commenters point out that considerable investment has been made in developing equipment to operate in the 2400-2483.5 MHz band.[30] Recently, spread spectrum equipment including wireless local area networks, a wireless intercom headset, and a new type of cordless phone have been approved for use in the 2400-2483.5 MHz band and it is likely that use of this band by spread spectrum devices will increase. Commenters contend that reallocation of the 2402-2417 MHz band will jeopardize the future of advanced communications systems that are being developed under Part 15.[31]

**Other Manufacturers, Licensees, and Local Governments**

14. Comments were filed by thirteen other entities, including equipment manufacturers, satellite service providers, public safety and utility organizations, and local governments. A number of these commenters noted a need for the Government to provide larger blocks of spectrum below 3 GHz. These commenters state that blocks of spectrum wider than 5 or 10 megahertz and unimpeded by continued government use are required to support wide area communications systems and to support systems capable of providing telecommunications technologies such as full motion video and high speed transmission of high resolution graphics.[32] These commenters also state that NTIA failed to adequately consider the needs of private radio users, particularly public safety entities, and that NTIA should do so in its final report.[33]

15. Parties with an interest in satellite services noted that some of the proposed spectrum, particularly the blocks above 3 GHz, would be useful for the fixed satellite service (FSS). These entities argue, however, that additional spectrum forsatellite services is required.[34] Although the Reconciliation Act requires that only spectrum below 5 GHz be considered toward fulfilling the 200 megahertz minimum requirement, Loral/Qualcomm urges NTIA to look at reallocation of spectrum above 5 GHz, particularly the 5000-5250 MHz band, for MSS feeder links.[35]

**Comments on the Process**

16. Commenters generally recognize the difficult task that NTIA faced in identifying spectrum for reallocation to the private sector. Several commenters commend and support NTIA in its efforts to reallocate spectrum.[36] A large number of non-Government commenters, however, express disappointment and concern that NTIA did not seek greater private sector input in identifying bands for

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[21] Radio Amateur Satellite comments at 2-3 and 10, ARRL comments at 18-19.
[22] ARRL comments at 17.
[23] *See* para. 36, *infra*.
[24] San Bernardino Microwave Society comments at 5.
[25] SCRRBA comments at 8.
[26] ARRL comments at n.3.
[27] *See* 47 C.F.R. § 15.247.
[28] *First Report and Order*, Gen Docket No. 81-413, 50 Fed Reg 25234 (June 18, 1985).
[29] *Report and Order*, Gen Docket 89-354, 5 FCC Rcd 4123 (1990).
[30] Larus Corporation comments at 1, GEC Plessey Semiconductors Inc. at 1.
[31] Larus Corporation comments at 1-2, GEC Plessey Semiconductors Inc. at 1-2, Western Multiplex Corporation at 1.
[32] Association of Public-Safety Communications Officials-International (APCO) comments at 3-7, Telecommunication Industry Association (TIA) comments at 13-14, Motorola, Inc. (Motorola) comments at 3-10.
[33] Motorola comments at 4-10, UTC comments at 5, APCO comments at 8.
[34] Loral/Qualcomm Partnership, L.P. (Loral/Qualcomm) comments at 1-3, COMSAT Corporation (COMSAT) comments at 2-8.
[35] Loral/Qualcomm comments at 3-6.
[36] *See*, e.g., comments of E.F. Johnson at 1-3, and comments of Digital Microwave Corporation.

reallocation.[37] The Telecommunications Industry Association (TIA) lists several problems that it believes have resulted from the lack of private sector input prior to release of the Preliminary Report. These include 1) complete lack of private sector input on the first 50 megahertz of spectrum, 2) NTIA identification of only the bare minimum amount of spectrum necessary to comply with the Reconciliation Act rather than a broader selection of spectrum, and 3) NTIA provision of insufficient details of federal operations to allow the private sector to evaluate fully the potential usefulness of the spectrum.[38] [39]

17. Motorola, Inc. (Motorola), the Association of Public-Safety Communications Officials-International (APCO), and the Utilities Telecommunications Council (UTC) all believe that NTIA has not adequately considered the needs of private radio users in identifying spectrum for reallocation.[40] These commenters note that Congress recognized the importance of private spectrum users, especially public safety users, in the Reconciliation Act. APCO questions whether NTIA has met its obligation under the Reconciliation Act because, claims APCO, it failed to consider adequately the immediate needs of the public safety community.[41] These commenters state that NTIA should more fully consider the needs of private radio users in its final report and selection of spectrum. Several commenters also note the importance of the Intelligent Vehicle Highway System in enhancing the capacity and efficiency of the Federal-highway infrastructure and urge that the future spectrum needs of this service also be considered during the final spectrum selection process.[42]

18. A number of commenters question whether the Department of Commerce has fully met its obligations under the Reconciliation Act, considering the existing non-Government use in some bands identified for reallocation and the limited potential for private sector use of some bands. Most notably, several commenters point to the significant existing private use of the 2402-2417 MHz band by Industrial, Scientific, and Medical equipment, particularly microwave ovens, as well as use of the band by the amateur radio service and by equipment authorized under Part 15 of the Commission's rules. They view these factors as severely restricting the potential for use of this band by the private sector and severely limiting the benefit to the public of reallocating this band. For these reasons, TIA states that for all practical purposes, this band is already allocated exclusively to non-Federal use; and that, therefore, reallocation of this band "does not meet the letter or spirit of Title VI." TIA calls for NTIA to immediately reconsider proposing the 2402-2417 MHz band for reallocation.[43]

19. Finally, commenters in the amateur radio community contend that the Department of Commerce has failed to meet its obligations because it did not conduct a study as to the feasibility of the amateur radio service to share with the commercial users as is required under Section 113(c)(3)(C) of the Reconciliation Act.[44]

## IV. ANALYSIS OF SPECTRUM IDENTIFIED FOR REALLOCATION

### 1390-1400 MHz

20. The Preliminary Report identified the 1390-1400 MHz band as spectrum that can be made available for exclusive non-Government use in January, 1999 provided it is not used for space-to-Earth links. NTIA also recommends that receiver standards for non-Government systems be adopted.[45] As with most of the bands identified for reallocation below 3 GHz, commenters believe that the relatively small size of the 1390-1400 MHz band will limit its usefulness, especially for wide-area terrestrial communications.[46] Commenters also note that adjacent channel use of FAA and DoD high-power radar systems will require development of equipment capable of tolerating interference, thereby adding to the cost of equipment.[47] Further, commenters note that, although this band is to be available on an exclusive basis for non-Federal use, the Department of Commerce has stated that the band is not to be used for space-to-Earth links and that some Government operations will continue in remote areas.[48] Use of this band is further constrained by U.S. allocation footnote 311 which limits fixed and mobile use of this band in thirteen areas of the U.S. and its territories. NTIA has recommended a five year delay in reallocating this spectrum; however, non-Government use of this band will be affected by continued operations of Government facilities at 17 locations, some of which are in or near major metropolitan areas, for ten years.[49]

21. Although located between cellular radio and personal radio services (PCS), we believe that the 1390-1400 MHz band is located too far from these services to be readily incorporated into either of them. In our recent *Memorandum Onion and Order* in GEN1Docket No. 90-314, where we finalized rules for PCS at 1830-1990 MHz, we found that equipment capable of operating in both the 1850-1990 MHz and the 2110-2200 MHz bands would cost 25 percent more than equipment that only operates in the 1850-1990

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[37] *See* comments of Cactus Intertie Systems/Cactus Radio Club, Inc. at 4, San Bernardino Microwave Society, Inc. at 1, Amateur Television Network at 2, SCRRBA at 6, Amateur Radio Council of Arizona, ARRl at 8-11, TIA at 2-6.

[38] TIA comments at 3-6.

[39] Although the Reconciliation Act did not specifically require the Department of Commerce to seek private sector input prior to issuing the Preliminary Report, it did set forth criteria to be used in identifying spectrum for reallocation, one of which is that the bands identified be "most likely to have the greatest potential for productive uses and public benefits under the 1934 Act if allocated for non-Federal use." *See* Reconciliation Act Section 113(a)(5).

[40] Motorola comments at 4-10, APCO comments at 2-8, UTC comments at 4-6.

[41] APCO comments at 4.

[42] IVHS America, Inc. comments at 1-3, Motorola comments at 14-15, Florida Department of Transportation comments at 1-3, Maine Turnpike Authority comments.

[43] TIA comments at 11-13.

[44] American Radio Relay League (ARRL) comments at 5-6.

[45] Preliminary Report at 5-4.

[46] Motorola comments at 3, APCO comments at 5-6.

[47] TIA comments at 14-15. In fact, in the Preliminary Report, NTIA states that receiver standards must be adopted to protect non-Government systems from interference from high-power government radar systems. In the past, the Commission has seldom adopted receiver standards, preferring instead to allow equipment manufacturers to determine an acceptable level of equipment performance to match the needs of their customers.

[48] TIA comments at 14-15.

[49] *See* Preliminary Report at 5-3, 4.

MHz band.[50] Similar or greater costs could be expected in incorporating this band into either the cellular service or PCS.

22. This band is located in a desirable part of the spectrum where propagation is favorable for mobile services. Equipment for operation in this band could undoubtedly be developed quickly. We agree with commenters, however, that the small size of the proposed allocation will make it difficult to implement new technologies. The 1390-1400 MHz band may not be sufficient to support a new service or to substantially promote development of new technologies.

**1427-1432 MHz**

23. The Preliminary Report identified the 1427-1432 MHz band as spectrum that can be made available for exclusive non-Government use in January, 1999 provided it is not used for airborne or space-to-Earth links.[51] As with the 1390-1400 MHz band, commenters cite the small size of the 1427-1432 MHz band as limiting potential uses.[52] TIA notes that, although this band is to be reallocated on an exclusive basis, the Department of Commerce has stated that the band can not be used for airborne or space-to-Earth links because of the need to protect adjacent channel radio astronomy operations, and that protecting these adjacent channel radio astronomy operations could make this band difficult to use.[53] In addition, although NTIA has proposed that this band be reallocated within five years, Government operations will continue at 14 locations for 15 years. Such continued use could adversely affect the ability of non-Government entities to use this spectrum.

24. We agree with commenters that the small size of this proposed allocation, as well as its remoteness from existing non-Government services, will make it difficult to use this spectrum either as an adjunct to an existing service or to support a new service. The Preliminary Report's suggestion that this band be combined with the 1390-1400 MHz band would yield an unbalanced allocation of one 5-megahertz wide block with a 10-megahertz block that would not be conducive to channel pairing arrangements and that might still be too small to promote development of new technologies.

**1670-1675 MHz**

25. The 1670-1675 MHz band has been identified for reallocation on a mixed use basis and to be made available in January, 1999.[54] The only Government operation identified by NTIA for continued operation is the Earth station operated by the National Oceanographic and Atmospheric Administration (NOAA) on Wallops Island, which receives data from NOAA's GOES weather satellite.[55] NTIA states that radiosondes operated by the Government in this band will be relocated to other frequencies.[56] NTIA also states that in order to protect radio astronomy operations in adjacent bands, this band is not to be used for non-Government airborne or space-to-Earth links.[57] TIA agrees with NTIA that before non-federal users can use this band, meteorological services will have to be redesigned or replaced. TIA cautions that adjacent channel radio astronomy operations may make it difficult to use this band for non-Government operations.[58]

26. WARC-92 reallocated this band worldwide for mobile use, intending that it be used to implement aeronautical public correspondence -- a common carrier service. As noted in the Preliminary report, however, the U.S. has already stated that it will not use this band for aeronautical public correspondence.[59]

27. Again, we believe that 5 megahertz may be too small an allocation to support development of new broadband technologies or wide-area operations and that this band is not located near enough to current non-government operations for it to serve as an adjunct to them.

**1710-1755 MHz**

28. NTIA has identified this band for mixed use and to be available January 2004. The Preliminary Report states that the Government will continue to operate indefinitely fixed microwave stations authorized prior to February 10, 1994, that are used by Federal power agencies or on which the majority of communications is for safety-of-life. The Government will also continue to operate fixed microwave facilities, tactical radio relay and aeronautical mobile stations authorized as of February 10, 1994, in 17 specific areas around the country.

29. Although the 1710-1755 MHz band is the largest block of spectrum identified for reallocation below 3 GHz, commenters state that the substantial continued Government use of the band will limit its value for non-Government service.[60] These commenters question whether the Federal Government might be able to relocate some or all of its microwave operations to another spectrum band or to consolidate them within a portion of this band.[61] In addition, commenters felt that, because of the substantial size of this band and critical need for spectrum for non-Government use, NTIA should attempt to reallocate this spectrum earlier than the ten years proposed.[62]

30. The 1710-1755 MHz is a desirable band located relatively close to the 1850-1990 MHz band allocated for PCS. The 1710-1755 MHz band is also the only band identified below 3 GHz where it might be feasible to support wide-area operations. We agree with commenters, however, that the amount of continued Government use of this band will severely limit its usefulness for non-Government oper-

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[50] *Memorandum Opinion and Order*, GEN Docket 90-314, released June 13, 1994, at para. 34, 9 FCC Rcd 1309 (1994).

[51] Preliminary Report at 5-4.

[52] Motorola comments at 3, APCO comments at 5-6.

[53] TIA comments at 15.

[54] Preliminary Report at 5-4.

[55] GOES is NOAA's Geosynchronous Operational Environmental Satellite that, the Preliminary Report states, consists of two geostationary satellites which include visible and infra-red imaging, space monitoring, a search and rescue subsystem, data collection platforms, and a relay of facsimile data between earth stations.

[56] A radiosonde is generally a balloon-borne meteorological instrument consisting of sensors coupled with a radio transmitter.

[57] Preliminary Report at 5-7.

[58] TIA comments at 15-16.

[59] Preliminary Report at 4-19.

[60] APCO comments at 6-7, Motorola comments at 7, GTE Service comments at 4, TIA comments at 16.

[61] TIA comments at 16, Motorola comments at 10-11, UTC comments at 2-3.

[62] TIA comments at 16-17, Motorola comments at 10-11, GTE comments at 4, UTC comments at 2-3, APCO comments at 6-7.

ations. Some of the 17 specified areas for continued Government use are in or near major metropolitan areas and have radii of operation ranging from 50 to 160 km. Further, NTIA has not indicated the locations and number of Federal power and safety-of-life microwave systems that must be protected. The lack of specific information on continued Federal Government use of this band makes it difficult to determine whether this band should be counted toward the minimum spectrum requirements under the terms of the Reconciliation Act. The Reconciliation Act states that a band of frequencies may only be counted toward the minimum spectrum requirement if the potential use of Federal Government stations is substantially less than the potential use to be made by non-Federal stations.[63] We lack sufficient information as to the actual amount of continued Federal Government operations proposed for this band to compare the amount of proposed Government use with potential non-Government use and to gauge its usefulness for future non-Government use.

**2300-2310 MHz and 2390-2400 MHz**

31. The Preliminary Report identifies the 2300-2310 MHz and 2390-2400 MHz bands as being available for reallocation for exclusive non-Government use. The 2300-2310 MHz band is identified as being available in January, 1996, provided that the band is not used for airborne or space-to-Earth links.[64] The 2390-2400 Mhz band is identified for immediate availability. The Preliminary Report recommends that this band not be used to provide airborne or space-to-Earth links.[65] As discussed above, amateur interests object to reallocation of these bands because of their current use by the Amateur service. Commenters state that NTIA failed to determine accurately the effect that reallocation of these bands would have in disrupting current use of Government bands by the Amateur service, as required by the Reconciliation Act. Further, commenters note that NTIA failed to determine to what extent commercial users could share this spectrum with the Amateur service, another requirement of the Reconciliation Act. Commenters have indicated that sharing between amateur radio licensees and commercial radio users is not feasible.

32. We believe that several factors hamper the possibilities for productive non-Government use of these bands. As with most of the spectrum identified for reallocation below 3 GHz, these 10 megahertz-wide band segments may prove too small to support new services. The Preliminary Report notes the bands' proximity to the bands in the 1850-2200 MHz range that the Commission has allocated for emerging technologies and contends that these bands could serve as adjuncts to technologies used in those bands. However, as we found in the PCS *MO&O* that equipment operating in multiple bands will cost approximately 25 percent more than equipment operating in a single band, it is not apparent that combining these bands with emerging technologies spectrum will be economically feasible.[66]

33. Non-Government use of these bands will also be restricted by the need to protect Government operations in adjacent bands. TIA and GTE caution that the presence of highly sensitive receivers and/or high power transmitters of NASA's deep space network in the adjacent bands may make it difficult to use these bands for non-Government operations.[67] NTIA has stated that, to protect NASA's deep space network and interplanetary research radar operations in adjacent bands, reallocation of the 2300-2310 MHz band for airborne or space-to-Earth links must be avoided. NTIA also states that additional constraints on land-based non-Federal operations in the 2300-2310 MHz band near the Goldstone, CA deep space Earth station may be necessary, and the Preliminary Report also alludes to the need for similar constraints with respect to the 2390-2400 MHz band.[68]

34. The largest factor affecting future use of these bands is their existing availability for use by the Amateur service.[69] Congress specifically sought to avoid disruption of existing use of Federal Government frequencies by amateur radio licensees.[70] We agree with commenters that there is substantial likelihood that reallocation of the 2300-2310 MHz and 2390-2400 MHz bands to commercial or local government use could cause serious disruption to Amateur service use of these bands.

**2402-2417 MHz**

35. The Preliminary Report identifies the 2402-2417 MHz band for exclusive non-Government use to be made available immediately.[71] According to the comments, the 2402-2417 MHz band is the most controversial band identified for reallocation. This band is also currently available for use on a secondary basis by the Amateur service and commenters raise the same concerns with respect to reallocation of this band as were discussed with respect to the 2300-2310 MHz and 2390-2400 MHz bands. In addition, amateur interests raise concerns about the future of the Amateur satellite service in this spectrum. In the Preliminary Report NTIA states that it declined to identify the 2400-2402 MHz band for reallocation because of existing use of this band by the amateur satellite service.[72] However, amateur entities contend that this small 2-megahertz wide band is insufficient to accommodate planned future satellite requirements.

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[63] Reconciliation Act at (b)(2)(B).
[64] Preliminary Report at 5-9.
[65] Preliminary Report at 4-17.
[66] *Supra* at note 50.
[67] TIA comments at 17, GTE comments at 4.
[68] Preliminary Report at 4-15. A number of Government agencies commenting on the Preliminary Report also stress the need to prohibit airborne or space-to-Earth links in the 2390-2400 MHz band and to limit terrestrial operations in Puerto Rico to protect the planetary research radar at Arecibo, Puerto Rico. *See*, National Research Council comments at 14, Cornell University/National Astronomy and Ionosphere Center comments at 5, and National Science Foundation at 1.
[69] *See* paras. 8-12., *Supra*.
[70] In the Reconciliation Act Congress required that bands of frequencies be identified that seek to avoid, "excessive disruption of existing use of Federal Government frequencies by amateur radio licensees." Reconciliation Act at § 113(c)(1)(C)(iii).
[71] Preliminary Report at 5-9.
[72] Preliminary Report at 4-17.

36. Further, commenters state that reallocation of the band will also likely result in loss of millions of dollars already invested in developing spread spectrum systems designed to operate in the band under Part 15 of our Rules.[73]

37. Although the 2402-2417 MHz band is the only band below 3 GHz where non-Government use would not be restricted or where use of the band would not be on a mixed basis,[74] we believe that this band provides the least potential for providing spectrum for new non-Government services.

38. The most problematic aspect of this band is its existing use by non-Government Industrial, Scientific, and Medical (ISM) devices and by devices authorized under Part 15 of our Rules. As discussed in the Preliminary Report, the 2400-2500 MHz band is occupied by over 80 million microwave ovens, which are ISM devices. The Preliminary Report includes in its Appendix E an analysis of possibilities for sharing with microwave ovens. This analysis concludes that the high level of noise created by microwave ovens between 2425-2475 MHz renders successful use of this frequency range by a licensed communication service unlikely. The analysis goes on to conclude, however, that the noise below 2425 MHz is significantly less and that advanced modulation techniques, such as spread spectrum, should be able to penetrate the noise below 2425 MHz. We disagree. An examination of the charts showing measurements for Green Mesa, near Boulder Colorado, and at Flagstaff, Arizona indicate that the noise in the 2400-2420 MHz range is only 10 to 15 dB below the noise at the center of the ISM band. Using NTIA's assertion that noise in the center of the band is 20 to 40 dB above receiver threshold noise, the noise in the 2400-2420 MHz band is still 5 to 30 dB above receiver threshold noise. This would make it extremely difficult for any licensed communication system to operate and would greatly reduce the advantages of using advanced technologies. The gain in capacity generally realized by advanced technology systems would have to be traded for providing resilience to interference from microwave ovens. TIA has submitted a study demonstrating that, because of the noise created by ISM devices that operate in this band, implementing a communications systems in this band will cost up to 50 times as much as a system operating in a band without interference from ISM devices.[75]

39. Despite the noise in this band, manufacturers developing equipment operating under Part 15 of our Rules have begun to use this band successfully. In 1990 we encouraged development of advanced spread spectrum devices in the 902-928 MHz, 2400-2483.5 MHz, and 5725-5850 MHz bands. Today there are literally millions of Part 15 devices operating in the 902-928 MHz band, including cordless phones, wireless alarm systems, computer local area networks, automated meter reading systems, antishoplifting systems, inventory control systems, and automatic vehicle identification systems. Although the 2400-2483.5 MHz band is not as heavily used as the 902-928 MHz band, there has recently been substantial development of, and investment in, equipment using this band. These include local area networks, wireless intercom systems, and cordless phones. It is unlikely that a licensed service would be able to share this band with these devices, which can operate with up to one watt of transmitter output power under Part 15 of our Rules.[76] Accordingly, reallocation of this band would jeopardize the significant private sector investment already made in developing new technologies operating under Part 15.

40. Considering the potentially adverse effects on the amateur radio service and on use of the band by devices operating under Part 15, as well as the difficulties in using this band because of the amount of noise from ISM devices, we believe that reallocation of this band presents less value to the private sector than any other band identified for reallocation in the Preliminary Report.

**3650-3700 MHz**

41. The Preliminary Report identified the 3650-3700 MHz band as being available for reallocation on a mixed use basis in January 1999.[77] The 3650-3700 MHz band is currently used by the non-Government fixed satellite service for international systems. COMSAT states that it already has several customers using this service as part of INTELSAT. Although COMSAT supports the transfer of 3650-3700 MHz, it notes that reallocating it for mixed use, as proposed by NTIA, would essentially maintain the status quo of existing Government/non-Government use.[78] COMSAT, requests that the entire 3600-3700 MHz band be reallocated for non-Government use, or, in the alternative, that the sharing arrangement that currently applies to the 3600-3700 MHz band be extended to the 3500-3600 MHz band.[79]

42. Although this band is already used by non-Government users, we believe that elimination of allocation footnote U.S. 245, which limits FSS satellite use to international inter-continental systems subject to a case-by-case interference analysis, would provide potential for increased non-Government use. As discussed below, however, we believe that the reallocation of additional spectrum adjacent to this band is justified for private sector use.

**4635-4660 MHz and 4660-4685 MHz Bands**

43. The Preliminary Report recommends that both the 4635-4660 MHz and 4660-4685 MHz bands be reallocated for exclusive non-Government use. The 4660-4685 MHz band is recommended for immediate reallocation and the

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[73] Larus Corporation comments at 1-2, GEC Plessey Semiconductors Inc. at 1-2, Western Multiplex Corporation at 1.

[74] Some Government agencies commenting on the Preliminary Report would, however, even place restriction on non-Government use of this band. *See* National Science Foundation comments at 1, and Cornell University/National Astronomy and Ionosphere Center comment at 5-6.

[75] TIA comments at Appendix.

[76] In the Preliminary Report, NTIA states that the shared use of the 902-928 MHz band between Federal Government systems and a wide-array of non-Government systems suggests that there is very efficient use of this band and it concludes that the large number of existing non-Federal incumbents eliminates the band from consideration for reallocation. Preliminary Report at 4-9. We expect that the situation with respect to the 2402-2417 MHz band would become very similar even though we have not yet seen the high level of use in this band as in the 902-928 MHz band.

[77] Preliminary Report at 5-9.

[78] COMSAT comments at 2-5.

[79] COMSAT comments at 5-8.

4635-4660 MHz band is recommended for reallocation in three years, although the report states that Government operations in 4635-4660 MHz will continue at three sites, each with an 80 km operating radius, for 15 years.

44. Loral/Qualcomm states that the 4635-4660 MHz and 4660-4685 MHz bands would be useful for MSS feeder links. Loral/Qualcomm also notes, however, that an additional 150 MHz of adjacent spectrum would greatly help in implementing commercial MSS service. According to Loral, this spectrum would be useful on either a shared or exclusive basis.[80]

45. Although these bands are already allocated for non-Government use by the fixed satellite service (space-to-Earth) on a co-primary basis with Government fixed and mobile use, there is currently no non-Government use of these bands. Use of these bands by the fixed satellite service is constrained by two factors: 1) US footnote 245, which limits use to international inter-continental systems subject to an interference analysis, and 2) Appendix 30b of the international Radio Regulations, which contains a plan that allots only two orbital slots to the United States. In addition, a bilateral agreement with Canada requires that terrestrial line-of-sight use of this band must coordinated with Canada.[81]

46. Provided that the domestic allocation footnote is eliminated for these bands, we believe that this spectrum would be useful in providing non-Government services although such use would still be constrained by the international allotment plan contained in Appendix 30b of the international Radio Regulations. As we discuss below, however, reallocation of substantially more spectrum in adjacent bands, even on a shared basis, could help realize the potential benefit to the public that this spectrum offers.

## V. DISCUSSION

47. In requiring that at least 200 megahertz of spectrum be reallocated from Federal Government use to private sector use Congress sought to promote more efficient use of the spectrum, provide spectrum on which advanced communications technologies could be implemented, provide spectrum to satisfy the future needs of public safety organizations, and provide spectrum for use by biomedical telemetry devices. Congress included both the public and the FCC in determining what spectrum is most appropriate for reallocation to meet these goals.[82] As evidenced by the instant Report, this process is a cooperative effort between NTIA and the FCC.[83] We look forward to building on this initial effort at satisfying the spectrum and communications needs of both Government and non-Government users.

48. We recognize that the task Congress set for the Department of Commerce was formidable and included a stringent time table for identifying and reallocating spectrum. Coordination with the Government agencies that use spectrum and quantification of the impact that spectrum reallocation will have on the ability of those agencies to fulfill their mandated mission within the time allotted for preparing the Preliminary Report required an extraordinary effort by NTIA. NTIA has risen to this task and has, in general, identified spectrum for reallocation that balances the needs of non-Government licensees with the impact that reallocation will have on Government agencies. After consideration of the comments filed in response to NTIA's Preliminary Report, however, we conclude that some modifications to the spectrum identified could more fully advance the goals set forth by Congress.

49. Congress intended that the spectrum identified have the greatest potential for productive uses and public benefits if allocated for non-Government use.[84] Generally, we believe that NTIA has developed a viable spectrum reallocation plan, however, as commenters have stated, there are a number of impediments that make commercial use of much of the spectrum identified for reallocation difficult. Much of the spectrum identified for reallocation is in band segments that are too small to accommodate the wide-area, high capacity communications systems of the future. Use of these bands will be further frustrated because they are generally located in a manner which makes it difficult to allocate paired channels or are scheduled for reallocation at different times. In addition, at least one of the proposed bands, at 2402-2417 MHz, is already heavily used by non-Government entities and reallocation presents limited gain to the public. Non-Government use of some bands is affected by continued in-band or adjacent-band Government use. Accordingly, we believe several changes to the NTIA reallocation plan would provide greater benefits to the public.

50. One area of the reallocation plan presented in the Preliminary Report that needs to be addressed is the 2402-2417 MHz band. Reallocation of the 2402-2417 MHz band presents little or no additional benefit to the public. This band is already used for non-Government services by the amateur radio community and by Part 15 devices. It will be extremely difficult to provide a licensed service in this band because of its heavy use by ISM equipment. Further, installing a licensed service in this band may result in a loss to the public of Part 15 spread spectrum communications equipment as well as possibly preventing use of this band for Amateur service operations. The benefits of providing short-range communications via unlicensed low power devices is generally recognized, and interest in such devices is growing. Recently there have been dramatic developments in such equipment such that it now can provide a wide and versatile array of services including cordless phone, wireless local area networks, wireless PBX, point-to-point communications, inventory tracking systems, and IVHS-related systems. In fact, the Federal Government has recognized the value of Part 15 devices and the benefits that such devices can offer its own agencies and its regulations permit Government use of unlicensed Part 15 devices.[85] Noting the growing impor-

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[80] Loral/Qualcomm comments at 2-3.

[81] This Bilateral agreement also requires that U.S. troposcatter systems in this band must be coordinated with Canada if they are within 500 km of the U.S./Canadian border.

[82] *See* Reconciliation Act at Sections 113(d)(2) and 113(d)(3).

[83] The Reconciliation Act requires that the Assistant Secretary of Commerce and the Chairman of the FCC meet at least biannually to conduct joint spectrum planning, including discussion of the spectrum allocation actions necessary to accommodate the future requirements of users and action necessary to promote the efficient use of spectrum, including shared use. Reconciliation Act at Section 112.

[84] Reconciliation Act at Sec. 113(a)(5).

[85] Part 7.8 of the NTIA Manual of Regulations & Procedures for Federal Radio Frequency Management.

tance of unlicensed devices, we recently allocated 20 megahertz of spectrum in the 1.8 GHz band for unlicensed PCS devices and indicated that we would pursue additional allocations for such devices.[86]

51. Considering the existing non-Government use of the 2402-2417 MHz band by the Amateur service, ISM equipment, and Part 15 devices, and the limited possibility for implementing a licensed commercial service in the band, we believe that the reallocation of this band will provide very little additional value to the public. Any future changes to this band could jeopardize significant private sector investments already made in this band and could result in a loss of benefits to the public and the Federal Government. Accordingly, we recommend that additional bands, possibly the 2300-2310 MHz and 1845-1850 MHz bands, be identified for immediate non-Government availability.

52. Although we believe that NTIA has established a foundation for a spectrum reallocation plan that greatly benefits the public, we suggest that NTIA consider a few changes to the process used in preparing the Preliminary Report. For instance, the Reconciliation Act requires that NTIA identify frequencies that span *not less than* 200 megahertz below 5 GHz and sets forth further guidelines for identifying spectrum.[87] In the future, NTIA could identify spectrum in excess of the minimum requirements, and then provide government agencies and the public an opportunity to work together to construct a reallocation plan that provides the best balance of minimizing impact to government agencies while maximizing the benefit to the public.

53. The public had only one opportunity to comment on the spectrum proposed for reallocation. Accordingly, there has been little opportunity for the public to comment on alternatives. We believe that if NTIA were to seek greater input from both the public and the FCC in identifying spectrum to be reallocated, spectrum can be identified which would be more useful to the public without seriously jeopardizing Government use thereof.

54. In revisiting its reallocation proposals, it would be helpful if bands could be identified that can be paired to provide full duplex service, are large enough to provide for development of new technologies, and sufficient to satisfy communications needs that have recently been identified. As evidenced by comments filed in response to NTIA's Preliminary Report, our recent PCS proceeding, and various other filings such as the petition filed by the Coalition of Private users of Emerging Multimedia Technologies,[88] modern and emerging technologies require large blocks of spectrum to accommodate high volumes of communications and the wide bandwidth necessary to transmit communications such as video. In addition, the mobile satellite service will play a critical role in development of a national and global information infrastructure and additional spectrum is needed for this service. Applicants for mobile satellite licenses have sought multiple spectrum allocations to accommodate MSS service link and feeder link communications.[89] To help satisfy both immediate and future communications requirements, the private sector would benefit from large blocks of spectrum that can be paired and that can be used to accommodate emerging technologies. To meet some needs it would be beneficial to the public to have access to bands above 5 GHz, discussed above, and therefore we believe that the NTIA should include consideration of such bands in its final report. Greater input from the public may allow NTIA to identify more spectrum than the 200 megahertz identified in the Reconciliation Act.

55. A number of potential alternative frequency bands and their potential benefits that we have preliminarily identified are discussed below.

**225-400 MHz**

56. As recognized in the Preliminary Report, this band offers desirable propagation characteristics and availability of mature, economical radio technology. The propagation characteristics are ideal for creation of wide area networks in the land mobile service. Congestion in the VHF/UHF bands currently available for non-Government land mobile is high and reallocation of spectrum in this band would be of immediate benefit in relieving such congestion. We are currently considering methods of improving the efficiency of use of non-Government land mobile spectrum by dividing the channel bandwidth of systems operating in the 72-76, 150-174, 421-430, 450-470, and 470-512 MHz bands.[90] Such channel splitting methods are difficult to implement in congested spectrum. Spectrum reallocated in the 225-400 MHz band could greatly facilitate our efforts by providing "green space" in which to begin implementing spectrum efficient systems. This spectrum could also provide greater flexibility for accommodating applications that require wider bandwidth, such as transmission of data or images, in the in the bands, while still improving the efficiency of two-way land mobile radio. Spectrum in this band could also be very valuable in enhancing public safety communications and could possibly provide spectrum for use by biomedical telemetry devices, which manufacturers have indicated require spectrum below 1 GHz.[91]

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[86] *Memorandum Opinion and Order*, GEN Docket 90-314, 9 FCC Rcd 1309 (1994). Unlicensed PCS applications would include, but not be limited to, high and low speed data links, cordless telephones, and wireless PBXs.

[87] Reconciliation Act, Section 113.

[88] This petition was filed with the Commission December 23, 1993, and is included for consideration in our proceeding concerning uses for the first 50 megahertz of spectrum to be reallocated from Federal Government to private sector use. ET Docket No. 94-32, 59 Fed Reg 25589 (May 17, 1994).

[89] We discuss the need for additional MSS and feeder link spectrum in our *Notice of Inquiry* to prepare for the International Telecommunication Union's 1995 World Radiocommunication Conference, *Notice of Inquiry*, IC Docket No. 94-91, 59 Fed Reg 25873 (May 18, 1994).

[90] *See Generally, Notice of Proposed Rule Making*, PR Docket No. 92-235, 7 FCC Rcd, 8105 (1992).

[91] *See* comments of the Critical Care Telemetry Group (CCTG) filed in response to our *Notice of Inquiry* in ET Docket 94-32. CCTG consists of Hewlett-Packard Company Medical Products Group, Marquette Electronics, Inc., Pacific Communications, Siemens Medical Systems, Inc. and SpaceLabs Medical, Inc. In its comments, CCTG states that it represents "essentially all of the companies located in the U.S. that are engaged in the production of low power, portable biomedical telemetry systems."

57. The Preliminary Report describes the 225-400 MHz band as the "single most critical spectrum resource... within the North Atlantic Treaty Organization (NATO)."[92] However, our NATO allies in Europe have found it appropriate to use portions of this band for non-military purposes. CEPT countries are using the 225-230 MHz band, at least temporarily, for Digital Audio Broadcasting and are considering using spectrum in the 380-400 MHz portion of the band for terrestrial public safety use. In addition, WARC-92 allocated the 312-315 MHz and 387-390 MHz bands for the mobile satellite service (MSS) on a secondary basis. If these bands could be made available domestically for such use, it would increase the amount of spectrum available below 1 GHz for MSS by approximately 120 percent. The *Notice of Inquiry* in IC Docket No. 94-31[93] notes that discussions between the FCC and NTIA are underway on use of the 312-315 MHz and 387-390 MHz bands for MSS; this proceeding presents an opportunity to act on these discussions.

58. Despite the complex use of this band for Government operations, as discussed in the Preliminary Report, the benefits of reallocating the spectrum might be found to outweigh those needs. As noted in the Preliminary Report, interest in civilian use of this band in Europe is growing.[94] Although the Preliminary Report notes that the conventional spectrum management process provides ample opportunity to explore shared or non-Government use of this band at a later date, we believe that prompt action to allow non-Government access to this band will further our efforts to relieve congestion in the VHF\UHF bands and to provide for advanced land mobile technologies.

**1350-1400 MHz**

59. This band is located between bands used for the cellular radio service and for personal communications service and we believe that equipment for use in this band could become quickly available. This band could offer additional spectrum to implement emerging technologies but it is sufficiently separated from the spectrum currently allocated for PCS and the cellular service that it could not readily be combined with either of those existing services. Non-Government users must have access to sufficient spectrum in this band to support new, independent services. Although use of this band by the radio astronomy service may limit the variety of non-Government uses, this band would be highly desirable for terrestrial services. Allocating only 10 megahertz of this band at 1390-1400 MHz would severely limit potential uses. We suggest NTIA reevaluate this band with a view toward making more of it available for non-Government use.

**1492-1525 MHz**

60. Except in the United States, WARC-92 allocated this band for use on a primary basis for the mobile satellite service in Region 2. MSS is an emerging service for which great demand is anticipated and which will benefit the nation's world-wide competitiveness. Full implementation of this service may, however, be hampered by a lack of available spectrum. While we recognize the difficulties in reallocating this band that are described in the Preliminary Report, we do not believe they fully preclude the possibility of doing so. The American Mobile Service Corporation (AMSC), in its comments, has provided an evaluation of the possibility of shared Government/non-Government use of this band.[95]

61. This band is part of spectrum in the 1435-1525 MHz and 2360-2390 MHz bands used for aeronautical telemetering. Out of this total 120 megahertz of spectrum, the 1492-1525 MHz band contains only 33 MHz, or less than 28 percent of the available spectrum. In a September 17, 1993, letter to the Department of State, the FCC and NTIA stated that discussions on use of the 1492-1525 MHz band for MSS are underway and would continue.[96] We recommend that NTIA more closely the examine the possibility of reallocating this band for non-Government use, at least on a mixed use basis.

**1675-1710 MHz**

62. In the Preliminary Report's discussion of Federal Government Meteorological services, the 1670-1675 MHz band was identified for reallocation. The Report noted that WARC-92 allocated this spectrum for mobile use by administrations wishing to implement aeronautical public correspondence. We note that WARC-92 also allocated the 1675-1710 MHz band for MSS in Region 2. As with the 1492-1525 MHz band, potential MSS operation in this band holds great promise to provide a wide variety of new communications services both domestically and internationally. AMSC has also provided an analysis of how non-Government MSS systems could potentially share this band with Government meteorological services.[97] The joint FCC/NTIA letter of September 17, 1993, also mentioned the 1675-1710 MHz band as a candidate for future MSS use and we request NTIA to further examine the reallocation of this band as well as the 1492-1525 MHz band.

**1710-1850 MHz**

63. The 1710-1850 MHz band is adjacent to the 1850-1990 MHz spectrum allocated by the Commission for PCS, and reallocation of this band would greatly enhance our ability to provide adequate spectrum for new and advanced telecommunications technologies. In its Preliminary Report, NTIA recognizes the great potential for benefit to the public that this band offers and recommends that the 1710-1755 MHz portion of the band be reallocated on a mixed basis. The Preliminary Report does not recommend reallocation of the 1755-1850 MHz portion of the band because of Federal use of the 1761-1842 MHz frequency range for tracking, telemetry and control of Government space systems. However, we are not convinced that non-Government use would be incompatible with Government use of the 1761-1842 MHz frequencies. The Preliminary Report refers to a study performed to evaluate the compatibility of high density land mobile operations with space operations in the 2025-2110 MHz and 2200-2300 MHz bands and applies the findings of that study to the

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[92] Preliminary Report at 4-23.

[93] Preparation of International Union World Radiocommunication Conferences, *Notice of Inquiry*, IC Docket No. 94-91, 59 Fed Reg 25873 (May 18, 1994).

[94] Preliminary Report at 4-25.

[95] AMSC comments at Annex II.

[96] December 17, 1993, joint letter to Mr. Richard C. Beaird, Acting U.S. Coordinator and Director, International Communications and Information Policy, Department of State, from Chairman, FCC and Assistant Secretary of Commerce for Communications and Information.

[97] AMSC comments at Annex I.

1761-1842 MHz band. Unlike the 2025-2110 and 2200-2300 MHz bands, however, use of the 1761-1842 MHz band for Government operations is limited to Earth-to-space transmissions. Thus, it is not obvious that the study is directly applicable to the 1761-1842 MHz band. It also appears from the Preliminary Report that Government use is limited to less than 10 locations. These limited Government operations might be able to coexist with some non-Government use. The Preliminary Report also does not describe why large "guard bands" are needed at either side of the 1761-1842 MHz band. The 6 megahertz wide 1755-1761 MHz frequency range and the 8 megahertz wide 1842-2850 MHz frequency range appear to offer excessive protection for space operations.

64. In addition, to further investigation into the feasibility of non-Government use of 1755-1850 MHz, the possibility of relocating a greater number of Government fixed and mobile operations from the entire 1710-1850 MHz band. The Preliminary Report indicates that there are a number of stations that will indefinitely continue to use the band, including stations used by Federal power agencies, fixed microwave operations where the majority of communications involves safety-of-life, and stations in a list of 14 operating areas as large as 160 km in radius, some of which encompass or are near major metropolitan areas.[98] The Preliminary Report notes that a list of specific Federal power agency facilities and safety-of-life facilities will be provided in the final report. However, at that stage, there will be no opportunity for the FCC to analyze and comment on the impact of such operations on non-Government use of the band.

65. We believe that the potential benefit to the public of access to this entire band, or at least a larger portion of the band than 1710-1755 MHz, is great. Every reasonable effort should be made to grant access to a greater portion of the 1710-1850 MHz band if that can be accomplished without seriously impairing non-Government use by continuing wide-spread Government operations. In addition, every effort should be made to reallocate this spectrum in less than the 10 years proposed for the 1710-1755 MHz band.

**3600-3700 MHz**

66. The Preliminary Report identified the 3650-3700 MHz portion of this band for reallocation. In the U.S. table of allocations, the entire 3600-3700 MHz band is currently allocated for the co-primary use of non-Government (FSS), but such use is limited to international inter-continental systems by US allocation footnote 245. As satellite communications systems become more wide-spread, the fixed-satellite service is growing in importance and additional spectrum will be needed. In addition, this band was identified in our negotiated rule making regarding MSS above 1 GHz as one of the more likely candidates for MSS/RDSS feeder link spectrum.[99] Reallocation of the entire 3600-3700 MHz band for private sector use and elimination of footnote 245 could provide much needed spectrum for FSS. We believe it would be very useful to fully examine the possibility of reallocating the entire band for non-Government use.

**4400-4990 MHz**

67. The Preliminary Report has identified the 4635-4685 MHz portion of this band for reallocation, and we believe that this spectrum will prove useful for non-Government operations. New technologies will, however, likely require greater than the 50 MHz identified for reallocation. From the general description of fixed and mobile applications described in Appendix D of the Preliminary Report, it appears that significant opportunities for additional non-Government use exist, considering that many of the Government operations appear to be in either remote areas or at sea. Accordingly, further consideration should be given to reallocating a significantly greater portion of the 4400-4990 MHz band for exclusive non-Government use as well as to the potential for sharing all of this spectrum with non-Government services.

**5000-5250**

68. Although the 5000-5250 MHz band is located above 5 GHz and would not count toward satisfying the 200 megahertz minimum reallocation required by the Reconciliation Act, reallocation of this band, or a portion of the band, would be useful for non-Government use. In its comments, Loral/Qualcomm states that it has been investigating possible use of this band for MSS feeder uplinks.[100] In addition, some countries in Europe have proposed that the 5150-5250 MHz portion of this band be allocated for development of "Hiperlan" data transmission systems which will transmit 20 Mbps. Such systems could facilitate the rapid transfer of information between computers. Reallocation of this band for such an emerging technology could allow U.S. companies to be involved in the early development of such systems and could boost the ability of U.S. companies to compete in Hiperlan deployment.

**5850-5925**

69. As with the 5000-5250 MHz band, the 5850-5925 MHz band is above 5 GHz and would not count toward satisfying the 200 megahertz minimum reallocation required by the Reconciliation Act. The 5850-5925 MHz band is currently allocated for primary use by the military for radiolocation operations. However, this band is also allocated for primary use for non-Government Fixed Satellite Service (Earth-to-Space) as well as for secondary use by the Amateur service. The 5850-5925 MHz band could be paired with the 3600-3700 MHz band, which currently has a primary allocation for use by the non-Government Fixed Satellite Service (space-to-Earth).

## VI. RECOMMENDATIONS

70. Congress has recognized the critical role that private sector communications service providers play in advancing telecommunications technologies, in giving a competitive advantage to this nation's economy, and in ensuring the public's safety of life and property. Congress has also recognized the need for providing these non-Government entities with sufficient spectrum to permit development and deployment of new communications services. Congress

[98] The Reconciliation Act states that frequencies assigned to Federal power agencies are only eligible to be reallocated on a mixed use basis and that assignments to those agencies shall not be withdrawn. Reconciliation Act at Section 113(c)(4).

[99] Report of the MSS Above 1 GHz Negotiated Rulemaking Committee released April 6, 1994. at 31.

[100] Loral/Qualcomm comments at 5-6.

passed the Reconciliation Act to help satisfy these future spectrum needs. NTIA has established a viable foundation on which to provide useful spectrum for use by the private sector. However, some modifications to the bands identified by NTIA in its Preliminary Report could provide the public even greater benefits. To assist identifying spectrum that would better serve the public, in this Report we have identified frequency bands that could provide a home for emerging and innovative communication technologies.

71. Table 2 provides a possible alternative plan for the spectrum reallocation. Although this plan significantly exceeds the 200 megahertz minimum required by the Reconciliation Act, it provides options that would have numerous advantages to the public. As discussed above, reallocation of spectrum in the 225-400 MHz band is consistent with actions under consideration in NATO countries and would enhance the options for implementing more efficient technologies in bands below 1 GHz. Spectrum in the 225-400 MHz band might also be used to implement a Federal Government/local Government public safety network to coordinate the activities of the Federal and local governments and could provide spectrum for use by biomedical telemetry devices.

72. Table 2 also adds the 1755-1760 MHz and 1845-1850 MHz bands to the spectrum proposed in the Preliminary Report. The 1710-1755 MHz band is the largest band below 3 GHz identified for reallocation and, we believe, one of the most potentially useful bands. We believe that the two 5-megahertz wide band segments that we have identified can be reallocated while still providing a sufficient guard band to protect the space operations discussed in the Preliminary Report. Reallocation of the 1755-1760 MHz band would provide a contiguous 50 megahertz block of spectrum located in a band for which equipment could be quickly developed. Further, moving the reallocation schedule for this band from January 2004, as proposed in the Preliminary Report, to January 1999 would allow the public to realize the benefits of this band much more quickly. The 1845-1850 MHz band is immediately adjacent to spectrum allocated for PCS and could serve as an adjunct to this service.

## TABLE 2

### Alternate Spectrum Reallocation Plan

| Bands for Reallocation | Amount (MHz) | Reallocation Status | Availability |
|---|---|---|---|
| 225-230 MHz | 5 | Mixed | Dependent on NATO agreement |
| 380-400 MHz | 20 | Mixed | Dependent on NATO agreement |
| 1390-1400 MHz | 10 | Non-Government only | January 1999 |
| 1427-1432 MHz | 5 | Non-Government only | January 1999 |
| 1670-1675 MHz | 5 | Mixed | Immediate |
| 1710-1760 MHz | 50 | Mixed | January 1999 |
| 1845-1850 MHz | 5 | Mixed | Immediate |
| 2300-2310 MHz | 10 | Non-Government only | Immediate |
| 2390-2400 MHz | 10 | Non-Government only | Immediate |
| 2402-2417 MHz | 15 | Non-Government only | Immediate |
| 3625-3700 MHz | 75 | Mixed | January 1999 |
| 4635-4660 MHz | 25 | Non-Government only | January 1997 |
| 4660-4685 MHz | 25 | Non-Government only | Immediate |
| 5850-5925 MHz | 75 | Non-Government only | January 1999 |
| **Total** | **335** | | |

73. Our alternative plan also adds the 3625-3650 MHz and 5850-5925 MHz bands to the spectrum proposed in the Preliminary Report. These bands are both currently allocated for use by the non-Government Fixed Satellite Service with one band allocated for use as an uplink and the other band allocated as a downlink. These bands might therefore be paired to provide more usable spectrum for the Fixed Satellite Service.

74. In addition, the reallocation plan in Table 2 advances the reallocation schedule for the 2300-2310 MHz band to match the schedule for the 2390-2400 MHz band. These bands are two of the few bands identified in the Preliminary Report that readily lend themselves to paired operations and simultaneous reallocation of the bands would greatly facilitate paired use of these bands.

75. We realize that advancing the reallocation schedule of some bands could be difficult because existing users will need to be relocated. To assist in a rapid reallocation of some of these bands we are willing to explore jointly with the Department of Commerce the possibility of non-Government entities compensating Government agencies for the cost of modifying or reallocating Government systems that are affected by the reallocation. Although it is probably not feasible to fully compensate agencies in all instances, it is likely that compensation for some operations, such as fixed microwave systems, is feasible. Also, providing for compensation to Government agencies should encourage agencies to relocate some operations that are scheduled to continue in mixed use bands.

76. We have provided in this report an analysis of the comments to NTIA's Preliminary Report and a discussion of the spectrum identified by NTIA as well as recommendations for spectrum that would better meet the needs of the public. We hope that, in preparing its final report, NTIA will consider the need for large blocks of spectrum, particularly below 3 GHz, that are unencumbered by continued Government operations in and around metropolitan areas. Such spectrum will provide great benefit to the public in providing for the introduction of new services, the expansion of existing services, and will provide much needed spectrum for the implementation of MSS. In addition, significant amounts of spectrum are required for the development of services above 3 GHz and even above 5 GHz. Options for spectrum reallocation need not be limited to bands below 5 GHz. Since the Reconciliation Act does not foreclose reallocation of spectrum in excess of 200 megahertz, NTIA and the FCC should also explore options available for sharing spectrum, thereby providing greater benefit to both Government and non-Government users and greatly expanding the efficient use of spectrum. We look forward to NTIA's final report, which we believe will be instrumental in providing fruitful options for advancing technological development and implementing a national and global information infrastructure.

## APPENDIX A

### List of Parties that Filed Comments on NTIA Report "Preliminary Spectrum Reallocation Report"

| Number | Party |
|---|---|
| 01 | United States Information Agency |
| 02 | City of Martinez, CA Police Department |
| 03 | GEC Plessey Semiconductors, Inc. |
| 04 | Larus Corporation |
| 05 | Department of Health & Human Services |
| 06 | National Science Foundation |
| 07 | Department of Veterans Affairs |
| 08 | Maine Turnpike Authority |
| 09 | CDR Gerald T. White, USN(ret) |
| 10 | George E. Dew |
| 11 | Richard M. Shappe |
| 12 | Cactus Radio Club, Inc. |
| 13 | San Bernardino Microwave Society, Inc. |
| 14 | Amateur Television Network |
| 15 | Palomar Amateur Radio Club |
| 16 | IVHS America |
| 17 | National Aeronautics and Space Administration |
| 18 | Department of the Army |
| 19 | Department of the Treasury |
| 20 | Western States VHF-Microwave Society |
| 21 | Southern California Repeater and Remote Base Association |
| 22 | James W. Tittle |
| 23 | Terry R. Young |
| 24 | National Research Council |
| 25 | Department of the Interior |
| 26 | Amateur Radio Council of Arizona |
| 27 | The National Astronomy and Ionosphere Center |
| 28 | Radio Amateur Satellite Corporation |
| 29 | Association of Public-Safety Communications Officials International, Inc. |
| 30 | Loral/Qualcomm Partnership |
| 31 | E.F. Johnson Company |
| 32 | National Communications System |
| 33 | American Mobile Satellite Corporation |
| 34 | Utilities Telecommunications Council |
| 35 | Motorola, Inc. |
| 36 | American Radio Relay League, Inc. |
| 37 | GTE Corporation |
| 38 | Telecommunications Industry Association |
| 39 | Communications Satellite Corporation |

40 National Oceanic and Atmospheric Administration

41 Department of Agriculture

42 Western Multiples Corporation

43 Digital Microwave Corporation

44 Florida Department of Transportation

45 U.S. Department of Justice

46 National Hydrologic Warning Council

47 Department of Energy

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

WilTel, Inc. and WilTel International, Inc., Transferors, File No. ITC-94-455(TC)

and

LDDS Communications, Inc. d/b/a METROMEDIA
Transferee

WilTel, Inc., Assignor File Nos. 1799-DSE-AL-94
9413412

and

LDDS Corporation,
Assignee

Application for authority pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, for authority to transfer control of Title II authorizations, and assign Title III licenses.

**MEMORANDUM, OPINION AND ORDER**

**Adopted: November 9, 1994 Released: November 21, 1994**

By the Chief, International Bureau:

## I. INTRODUCTION

1. On August 25, 1994, WilTel, Inc., WilTel International, Inc., LDDS Communications, Inc. d/b/a LDDS METROMEDIA ("LDDS") and LDDS Corporation ("LDDS Corp.") (collectively "the Applicants"), pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 214 and § 310(d), submitted the above-captioned application requesting authority to (1) transfer control of Title II authorizations held by WilTel, Inc. and WilTel International, Inc. to LDDS,[1] (2) assign a domestic satellite service blanket earth station license held by WilTel, Inc. to LDDS Corp.,[2] and (3) assign thirty-six point-to-point microwave stations from WilTel, Inc. to LDDS Corp.[3] On August 31, 1994, the application was placed on public notice and no comments were received. For reasons discussed below, we conclude that the proposed transactions will serve the public interest and that the application should be granted.

## II. BACKGROUND

2. WilTel, Inc., a Delaware corporation, is an interexchange carrier with authority to provide resale of international message telecommunications service ("IMTS") to most international locations and private line service between the United States and Canada and the United States and Cuba.[4] WilTel, Inc. also operates an extensive fiber optic network within the United States. WilTel International, Inc. is authorized to engage in private line resale to sixty-five countries.[5] Both entities are wholly owned by Williams Telecommunications Group, Inc. ("WTG"), which, in turn, is wholly owned by The Williams Companies, Inc., a publicly held corporation.[6]

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[1] *See infra* Appendix A. Appendix A is the list of WilTel's §214's and pending §214's.

[2] The domestic satellite earth station call sign is: E890791, File No. 1561-DSE-P/L-89. Applicants also request the Commission to reflect the subject transaction by amending WilTel International, Inc.'s pending 214 application, *WilTel International, Inc.*, File No. ITC-94-227, and WilTel Undersea Cable, Inc.'s pending cable landing license application, *Application for Cable Landing License*, File No. SCL-94-002.

[3] *See infra* Appendix B. Appendix B is a list of WilTel's Part 21 Point-to-Point Microwave Licenses.

[4] *See Application*, at 2; *WTG Central, Inc.* (WilTel, Inc.), 6 FCC Rcd 2339 (1991) (authorizing private line service between the United States and Canada); *WilTel International, Inc., Memorandum Opinion, Order, Authorization & Certification* , DA 94-1098 (released Oct. 5, 1994) (authorizing IMTS and other switched services, including facsimile, data and video transmission services, and international private line service by satellite between the United States and Cuba).

[5] *WilTel International, Inc.* 9 FCC Rcd 1287 (1994) (resale of international private line service to 48 countries); *WilTel International, Inc.*, File No. ITC-94-292, granted pursuant to Public Notice Report No. I-7019 (released Aug. 17, 1994) (resale of private line service to an additional 17 countries).

[6] The Williams Companies, Inc. does not have any 10% or greater shareholders. *See Application to Transfer Control of WilTel, Inc. and WilTel International, Inc. to LDDS Communications, Inc. d/b/a LDDS METROMEDIA and related transactions ("Application")*, Attachment C, at 4.

3. LDDS, a Georgia corporation, is the nation's fourth largest long-distance carrier.[7] Domestically, LDDS provides MTS and private line service on a resale and facilities basis. Internationally, LDDS provides facilities-based service to Canada only, although it has received authority to provide facilities-based service to many other countries.[8] LDDS also has authority to provide switched and private line services via resold private lines between the United States and Canada[9] as well as to provide resold non-interconnected private line service to several countries.[10] LDDS controls a number of subsidiaries engaged in similar business activities, such as LDDS Corp. LDDS Corp., a Delaware corporation, owns and operates common carrier point-to-point microwave stations, international and domestic earth stations, and other radio facilities for the purpose of providing facilities-based long distance telecommunications services.[11]

4. Subject to Commission and other regulatory approvals, LDDS and The Williams Companies, Inc. have entered into an agreement pursuant to which LDDS would acquire WilTel Network Services for $2.5 billion.[12] Upon closing of the transaction, ultimate control of WilTel, Inc., WilTel International, Inc., and WilTel Undersea Cable, Inc., (collectively "WilTel") and the Title II authorizations and pending applications now held or filed by those entities, would be transferred to LDDS. In addition, the Title III radio licenses held by WilTel, Inc. would be assigned to LDDS Corp.[13]

5. The Applicants argue that grant of the application is in the public interest because the combined entity will be a stronger competitor in the interexchange market. They state that the proposed transaction will bring together LDDS, one of the fastest-growing interexchange carriers, with WilTel, which has unmatched experience in the operation of advanced fiber optic networks, as well as an interexchange business of its own. The Applicants assert that the proposed acquisition is likely to benefit consumers through improved services and lower rates.[14]

## III. DISCUSSION

6. Sections 214(a) and 310(d) of the Act require that we find that the public interest, convenience, and necessity will be served by the transfer of control of a company holding Section 214 certificates and the assignment of Title III radio licenses. Subsumed in the public interest standard is a requirement that we review, as appropriate, the citizenship, character, financial, technical and other qualifications of the transferee applicant.[15] Based on the evidence in the record, we conclude that LDDS, an existing interstate and international communications carrier, satisfies the Commission's threshold qualification requirements and has the financial wherewithal and technical expertise to provide service consistent with the public interest.[16]

7. In addition to considering whether the applicant meets the threshold requirements under Sections 214(a) and 310(d) of the Act, we consider the proposed transactions' competitive effect. The Commission is authorized to enforce Section 7 of the Clayton Act with respect to mergers involving common carriers such as LDDS and WilTel.[17] The courts have construed these statutory authorizations to mean that the Commission has discharged its responsibilities "when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[18]

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[7] Both Metromedia Company and ALLTEL Corporation hold more than 10% of LDDS' shares. ALLTEL provides local exchange services. Metromedia Company primarily manages portfolio companies in the hospitality, technology and auto parts businesses. John W. Kluge is the Chairman of the Board of LDDS Communications, Inc. and is a general partner of Metromedia Company. Stuart Subotnick, a director of LDDS Communications and the other general partner of Metromedia Company, holds a 50% ownership interest in Q Broadcasting, Inc., which owns radio stations WSTC(AM) and WQQQ(FM) in Stamford, Connecticut. *See Application*, Attachment A, Exhibit 2.

[8] *LDDS Communications, Inc, Memorandum Opinion Order and Authorization*, 8 FCC Rcd 5453 (1993). *See also* Letter from Julie Barton, Hogan & Hartson, to Helene T. Schrier, Esquire, FCC (Nov. 4, 1994) (*"Letter"*). LDDS recently obtained facilities-based authority to provide IMTS to Algeria, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Morocco, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Tunisia, and Turkey. *LDDS Communications, Inc. d/b/a/ LDDS METROMEDIA, Order and Authorization*, 9 FCC Rcd 4896 (1994); and to provide facilities-based IMTS and private line services between the United States and Cuba. *LDDS Communications, Inc., Memorandum Opinion, Order, Authorization & Certification*, DA 94-1098 (released Oct. 5, 1994). To date, LDDS does not provide service to these countries. *See Letter, supra*.

[9] *LDDS Communications, Inc., Order and Certificate*, 9 FCC Rcd 1844 (1994).

[10] *LDDS Communications, Inc., Order Authorization and Certificate*, 9 FCC Rcd 1379 (1994) (Brazil, Ireland, Singapore and the U.K.). Very few private lines are provided on any of these routes. *See Letter, supra* note 8.

[11] *Application*, Attachment B, Exhibit 2. Additionally, Applicants certify that they do not have an affiliation with a foreign carrier as defined in 47 C.F.R. § 63.01(r).

[12] The Applicants have clarified for the record that the corporate entity actually being sold to LDDS is WTG. WTG today includes certain businesses that will not be sold to LDDS, but will instead be spun-off to the Williams Companies, Inc., parent of WTG. WilTel Network Services refers to those operations (including the applicants') remaining in WTG that would be transferred to LDDS at closing. Letter from Joel S. Winnik, Hogan & Hartson, to Susan O Connell, Esquire, FCC (Nov. 8, 1994).

[13] *Application* , at 2.

[14] *Application*, at 3.

[15] 47 U.S.C. §§ 308(b) and 310(d). *See Contel Corp., Memorandum Opinion and Order*, 6 FCC Rcd 1003 (1991).

[16] *See generally, Application.*

[17] Section 702(d) of the Communications Act, 47 U.S.C. § 602(d); 15 U.S.C. § 21(a). Section 7 of the Clayton Act, 15 U.S.C. § 18, proscribes the acquisition of the stock or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."

[18] *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (*en banc*). We have discretion whether to enforce Section 7 of the Clayton Act. *United States v. FCC*, 652 F.2d at 83. We exercise our discretion not to invoke our Clayton Act jurisdiction in this proceeding because our authority under the Communications Act suffices to achieve a result consistent with both the public interest standard and its competitive component.

8. After due consideration, we find it unlikely that the proposed merger will have anticompetitive effects in any relevant market.[19] First, both applicants provide service in the U.S. interexchange service market.[20] LDDS operates primarily as a reseller, and WilTel operates an extensive fiber optic network. Based on regular reports to the Commission, it appears that the proposed merger will result in a merged entity with a market share of approximately three percent in the interexchange market.[21]

9. The other markets in which the proposed merger might have anticompetitive effects can be stated as (a) international message telecommunications service (IMTS) and (b) other, "non-IMTS," international telecommunications services.[22] LDDS and WilTel both provide IMTS; LDDS does not now provide significant amounts of non-IMTS services, but WilTel does.[23] Each provides its international services almost entirely as a reseller.[24] Based on regular reports to the Commission, it appears that theproposed merger will result in a merged entity with a market share, on all international routes combined, of approximately one percent of IMTS services and less than one percent of non-IMTS services.[25] It does not appear that the merged entity has a significantly higher market share on any individual route.

10. The market shares stated in the preceding two paragraphs do not raise competitive concerns, absent a showing of special circumstances.[26] No such showing has been made here. Moreover, we note the following additional factors, which are present in each relevant market, that lead us not to expect any significant anticompetitive effects from the proposed merger: (1) no customer or competitor of either applicant has protested the merger; (2) neither applicant is an entrenched monopoly or a bottleneck; and (3) the merged entity will face direct competition from many large, well-capitalized, experienced facilities-based carriers and resellers.

11. Based on the foregoing consideration, the proposed transfer does not appear to result in any anticompetitive effects under our public interest analysis. We note, in support of our conclusion, that the United States Department of Justice has reviewed the proposed merger and has not objected to it or otherwise questioned its lawfulness. Moreover, we anticipate that the proposed transaction will offer pro-competitive benefits by producing a combined entity with improved capability of serving customers in the U.S. domestic interexchange and international markets.

## IV. CONCLUSION

12. In conclusion, the proposed transfer appears to raise no competitive concerns under our public interest analysis. We also find that LDDS is legally, technically, financially and otherwise qualified to operate WilTel's telecommunications facilities andthat the proposed transaction would, in fact, offer some pro-competitive public interest benefits. Consequently, we find that grant of the instant application for consent to transfer of control and assignment of licenses will serve the public interest, convenience and necessity.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of WilTel, Inc., WilTel International, Inc. and LDDS Communications, Inc., File No. ITC-94-455(TC), IS GRANTED and WilTel, Inc., WilTel International, Inc., WilTel Undersea Cable, Inc., and LDDS are authorized to transfer control of: WilTel, Inc.'s and WilTel International, Inc.'s Title II authorizations; and WilTel International, Inc.'s and WilTel Undersea Cable, Inc.'s interests in pending Title II and cable landing license applications to LDDS.

14. IT IS FURTHER ORDERED that the pending Title II and cable landing license applications filed by WilTel International, Inc. and WilTel Undersea Cable, Inc. are amended to reflect the authority granted herein.

15. IT IS FURTHER ORDERED, pursuant to Section 310(d) of the Communications Act of 1934, as amended, that the application of WilTel Inc. and LDDS Corp., File Nos. 1799-DSE-AL-94 and 9413412, IS GRANTED and WilTel Inc. is authorized to assign WilTel Inc.'s Title III licenses to LDDS Corp.

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[19] The relevant "product market" is the line of commerce within which there is interchangeability of use between a service or product and a reasonable substitute for it, given consideration of price, use, and quality. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962); *United States v. FCC*, 652 F.2d 72, 97 (D.C. Cir. 1980). The relevant "geographic market" is the area in which buyers can practically turn for alternative sources of supply, or in which there are sellers who act to restrain the prices charged to those buyers. *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

[20] The Commission has found that interexchange services in the United States constitute a relevant market. *Craig O. McCaw, Memorandum Opinion and Order*, ¶ ¶ 11-12 (released Sept. 9, 1994), FCC No. 94-238, File No. ENF 93-44, *appeal pending on other grounds* sub nom. *Southwestern Bell Corp. v. FCC*, D.C. Cir. No. 94-1637 ; *Common Carrier Services*, 95 FCC 2d 554, 562-63 (1983), *rev'd on other grounds sub nom., AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992).

[21] *Long Distance Market Shares, Second Quarter, 1994*, Industry Analysis Division, Common Carrier Bureau, at Table 5 (Sept. 1994).

[22] *OTI Corp.*, 6 FCC Rcd 1611, 1612 (1991), and *General Electric Co.*, 3 FCC Rcd 2803, 2804, n.10 (1988), *review denied*, 4 FCC Rcd 8207 (1989), *both following International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *reconsideration denied*, 60 Rad. Reg. 2d (P & F) 1435, FCC 86-339 (1986).

[23] *Preliminary 1993 Section 43.61 International Telecommunications Data*, Industry Analysis Division, Common Carrier Bureau, at Figure 7 (Sept. 1994).

[24] *Compare id.* at Table D1 *with* Figure 7, *supra* note 23.

[25] *See* Figures contained in reports cited *supra* notes 23 & 24.

[26] An accepted benchmark for measuring the competitive effects of a merger of two firms in the same market is the Herfindahl-Hirschman Index ("HHI"), which yields a numerical estimate of the post-merger amount of concentration in a market. See 1992 Department of Justice - Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,570, 20,573-5 to -6 (1992) ("Guidelines"). Even in a highly concentrated market, a merger producing a competitor with a three percent market share would cause an increase of much less than fifty points. According to the Guidelines, "[m]ergers producing an increase in the HHI of less than fifty points . . . . are unlikely to have adverse competitive consequences and ordinarily require no further competitive analysis." Guidelines at 20,573-6.

16. IT IS FURTHER ORDERED that LDDS will assume all terms and conditions associated with the assigned Title III licenses.

17. This order is issued under Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

## APPENDIX A

## CURRENT AND PENDING WILTEL FCC SECTION 214 AUTHORIZATIONS

| Company | File No. | FCC Cite | Service, Facility or Transaction Authorized |
|---|---|---|---|
| Houston Network, Inc. [WilTel, Inc.] | ITC-88-077 | 3 FCC Rcd 2461 (1988) | Resale of international MTS |
| Axcess Telecommunications Inc. [WilTel, Inc.] | ITC-89-68-AL | 4 FCC Rcd 4534 (1989) | Assignment of Houston Network IMTS resale certificate to Axcess, a former subsidiary of Williams Telecommunications Group, Inc. |
| WTG-Central, Inc. [WilTel, Inc.] | ITC-90-166, ITC 90-196(A) | 6 FCC Rcd 2339 (1991) | Private line service between the U.S. and Canada |
| Vyvx Telecom, Inc. [WilTel, Inc.] | ITC-92-034-AL | Granted December 9, 1991 | Assignment of Vyvx Telecom [formerly Axcess Tele-communications] IMTS resale certificate to WilTel, Inc. |
| WilTel International, Inc. | ITC-93-283-AL | Granted October 6, 1993 | Assignment of WilTel, Inc. Canada private line certificate to WilTel International |

| | | | |
|---|---|---|---|
| WilTel International, Inc. | ITC-93-281 | 9 FCC Rcd 1287 (1994) | Resale of international private line service to 48 countries |
| WilTel, Inc. | ITC-93-092 | 9 FCC Rcd 1381 (1994) | Resale of IMTS obtained from its affiliate, WilTel International |
| WilTel International, Inc. | ITC-94-227 | DA 94-1098 October 5, 1994 (granted authority to provide IMTS, private line and video to Cuba by satellite only, cable part still pending) | Operation of satellite and cable facilities between the U.S. and Cuba |
| WilTel Undersea Cable, Inc. | SCL-94-002 | Public Notice March 23, 1994 | Construction and operation of fiber optic cable between the United States and Cuba |
| WilTel International, Inc. | ITC-94-292 | Report No. I-7019 August 17, 1994 | Resale of private line service to 17 countries not included in initial private line resale application |
| WilTel International, Inc. | ITC-94-090 | Report No. I-6931 February 23, 1994 | Resale of public switched services |

## APPENDIX B

## WILTEL, INC. PART 21 POINT-TO-POINT MICROWAVE LICENSES

| CALL SIGN | APPROXIMATE LOCATION |
|---|---|
| WAC 947 | Portland, OR |
| WAC 948 | Fern Praire, WA |
| WAC 949 | Stevenson, WA |
| WLC 950 | Willard, WA |
| WLC 951 | Murdock, WA |
| WLC 952 | Rooseveldt, WA |
| WLC 953 | Beverly, WA |
| WLC 954 | Plymouth, WA |
| WLC 955 | Pendleton, OR |
| WLC 956 | Pendleton, OR |
| WLC 957 | Kamela, OR |
| WLC 958 | Union, OR |
| WLC 959 | Baker, OR |
| WLC 960 | Baker, OR |
| WLC 961 | Huntingdon, OR |
| WLC 962 | New Plymouth, ID |
| WLC 963 | Caldwell, ID |
| WLC 964 | Boise, ID |
| WLN 419 | Boise, ID |
| WLC 965 | Mountain Home, ID |
| WLC 966 | Mountain Home, ID |
| WLC 967 | Hagermann, ID |
| WLC 968 | Twin Falls, ID |

| | |
|---|---|
| WLC 969 | Kimama, ID |
| WLC 970 | Heyburn, ID |
| WLC 971 | American Falls, ID |
| WLC 972 | Chubbock, ID |
| WLC 973 | Soda, Springs, ID |
| WLC 974 | Soda Springs, ID |
| WLC 975 | Soda Springs, ID |
| WLC 976 | Pennington, ID |
| WLC 977 | Laketown, UT |
| WLC 978 | Woodruff, UT |
| WLM 416 | Evanston, WY |
| WLA 839 | Lake Charles, LA |
| WLC 840 | DeQuincy, LA |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Cruisephone, Inc. File No. I-T-C-94-441

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to provide Inmarsat Standard B and Standard M Mobile-Satellite Services in the Atlantic, Pacific and Indian Ocean Regions

**MEMORANDUM, OPINION, ORDER AND AUTHORIZATION**

**Adopted: November 14, 1994; Released: November 15, 1994**

By the Chief, International Bureau:

1. On August 2, 1994, Cruisephone, Inc. ("Cruisephone") filed an application pursuant to Section 214 of the Communications Act of 1934, as amended, for authority to provide Inmarsat Standard B and Standard M mobile-satellite services in the Atlantic Ocean Region ("AOR"), Pacific Ocean Region ("POR") and Indian Ocean Region ("IOR"). The application was placed on public notice. No oppositions were received.

2. Cruisephone is a Delaware corporation that is fifty percent owned by France Cable and Radio, which in turn is controlled by France Telecom. The other fifty percent is owned by U.S. citizens. Cruisephone arranges the provision of cellular service to ships located in U.S. coastal waters; installs cellular equipment on cruise ships and arranges for them to obtain cellular services from cellular companies operating outside the United States; and provides marketing, sales, billing, and collection services in connection with the provision of satellite communications services to the cruise industry. Cruisephone currently has authority to resell maritime mobile-satellite service ("MMSS") via the Inmarsat system in the AOR, POR and IOR.[1]

3. Cruisephone requests authority to provide Inmarsat Standard B and Standard M mobile-satellite services in the ship-to-shore direction only in the AOR-East and AOR-West via the Laurentides, Quebec, Canada foreign land earth station ("LES") and in the POR via LES facilities at Hong Kong.[2] Cruisephone states that it may construct or lease its own U.S.-based Inmarsat Standard B and Standard M facilities for this traffic as soon as there is an economic justification for so doing. Cruisephone requests authority to provide service in the ship-to-shore and shore-to-ship directions in the IOR via the Hong Kong LES. It states that it cannot provide IOR service from U.S.-based facilities because the footprint of Inmarsat's IOR satellite does not cover the United States.[3]

4. Cruisephone seeks to offer Inmarsat Standard B and Standard M for MMSS and international land mobile satellite service ("LMSS").[4] Cruisephone states that all services will be provided via Inmarsat first- and second-generation satellites. Cruisephone states that accounting will be performed in accordance with generally accepted accounting principles. Charges and regulations governing the service will be specified in one or more tariffs which Cruisephone will file with the Commission to the extent required by law.

5. According to Cruisephone, grant of this application will serve the public interest, convenience, and necessity by increasing competition in the provision of satellite communications services to the cruise industry. Authorization of Cruisephone to provide Inmarsat Standard B and Standard M service in the AOR, POR, and IOR will enable Cruisephone to offer these services globally, which Cruisephone needs if it is to compete effectively with foreign Inmarsat signatories offering global coverage.

6. Although Cruisephone is affiliated with a foreign carrier, we do not believe this affiliation raises concerns of discrimination or unfair competitive advantage in this context. Cruisephone's affiliation with France Telecom does not provide Cruisephone an opportunity to discriminate against competing U.S. carriers because Cruisephone is not using any France Telecom facilities. In addition, Cruisephone's potential customers that use Inmarsat Standard B and Standard M terminals have the ability to select any Inmarsat capable carrier from around the world to provide their services. Cruisephone, thus, lacks bottleneck control of either the uplink or the downlink portions of the services. Finally, Cruisephone is not using any Title III facilities in the United States; therefore, there are no alien ownership issues arising under Section 310(b) of the Communications Act.

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[1] *See* Cruisephone Application File No. I-T-C-94-442, granted effective October 8, 1994, listed in Public Notice No. I-7047, released October 12, 1994.

[2] Cruisephone does not request authority to provide shore-to-ship services in the AOR or POR.

[3] Cruisephone's application to use earth stations outside the United States to provide Inmarsat B and Inmarsat M services is similar to applications we have granted from IDB Mobile Communications, Inc. (IDB) and Seven Seas Communications, Inc. (Seven Seas). *See IDB Mobile Communications, Inc.*, 8 F.C.C. Rcd. 5616 (1993) and *Seven Seas Communications, Inc.*, 9 F.C.C. Rcd. 1744 (1994). Cruisephone has stated that the same circumstances that led to our decision to authorize IDB and Seven Seas to provide these services from foreign earth station facilities are present here; namely (1) because of the location of the Inmarsat satellites covering the IOR, it is impossible to serve the IOR from an earth station in the United States; and (2) Inmarsat B and M are new services in their developmental stages with few terminals registered worldwide. Therefore, it is not feasible for Cruisephone to construct its own earth station until there is an adequate economical justification for so doing.

[4] Cruisephone's international LMSS services include (1) communications within and between foreign countries, excluding North America, and (2) communications between North America and mobile-satellite terminals located outside North America. Cruisephone does not seek authorization to provide LMSS to or from mobile-satellite terminals located in North America, defined as the United States, Canada and Mexico. Cruisephone seeks to offer service both to mobile-satellite terminals and to temporary-fixed satellite terminals.

7. Based on the foregoing, we conclude that it is in the public interest to grant Cruisephone authority for the provision of ship-to-shore Inmarsat Standard B and Standard M MMSS and international LMSS in the AOR, POR and IOR, and shore-to-ship Inmarsat Standard B and Standard M MMSS and international LMSS in the IOR, subject to the conditions set forth herein. We also find that Cruisephone's affiliation with France Telecom does not provide Cruisephone the opportunity to discriminate against competing U.S. carriers.

8. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, that the application of Cruisephone, Inc., File No. I-T-C-94-441, IS GRANTED subject to the limitations set forth below, and Cruisephone is authorized to:

A. provide Inmarsat Standard B and Standard M mobile-satellite service in the ship-to-shore direction only in the AOR-East and AOR-West via the Laurentides, Quebec, Canada foreign LES and in the POR via LES facilities at Hong Kong;

B. provide Inmarsat Standard B and Standard M mobile-satellite service in the ship-to-shore and shore-to-ship directions in the IOR via the Hong Kong foreign LES; and

C. offer Inmarsat Standard B and Standard M mobile-satellite service for the following applications: maritime mobile-satellite service, international land mobile-satellite service, and international land-based temporary-fixed satellite services.

9. IT IS FURTHER ORDERED that Cruisephone's provision of international land mobile-satellite service and land based temporary-fixed satellite services will be limited to (i) communications within and between foreign countries, excluding North America,[5] and (ii) communications via the Laurentides, Quebec, Canada LES and via the Hong Kong LES between fixed points in North America and mobile-satellite terminals located outside North America. Cruisephone may not provide international LMSS to or from mobile-satellite terminals located in North America, defined as the land area of the United States, Canada and Mexico. The United States includes Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.

10. IT IS FURTHER ORDERED that Cruisephone shall not provide any Inmarsat Standard B or Standard M service from the United States to points in the AOR or POR under this authorization.

11. IT IS FURTHER ORDERED that Cruisephone is authorized to provide international LMSS and land-based temporary-fixed satellite services only within the frequency bands specified below which are consistent with the U.S. allocation for maritime services. Thus, Cruisephone shall serve only those land mobile satellite and land-based temporary-fixed satellite terminals communicating in the transmit frequency band 1626.5-1645.5 MHz and the receive frequency band 1530-1544 MHz for the mobile-to-satellite and satellite-to-mobile links of its international land mobile-satellite services. In addition, users of this service shall obtain the appropriate license or other authorization from the local telecommunications authority of the country in which the terminal will be used and any necessary licenses or authorizations from Agencies or Departments of the United States government (such as Treasury or Commerce). Thus, this authorization shall not be construed as providing domestic uplink or downlink authority within countries outside of the United States.

12. IT IS FURTHER ORDERED that this authority does not cover the provision of international land mobile-satellite services or land-based temporary-fixed satellite services via any new land earth stations or Inmarsat satellites or cover any land mobile-satellite services not specifically authorized herein.

13. IT IS FURTHER ORDERED that this authorization is conditioned upon completion of the consultation(s) required by Article XIV(d) of the Intelsat Agreement to ensure technical compatibility and to avoid significant economic harm. In addition, Cruisephone shall maintain as its first priority the service of maritime commercial, safety and distress needs, and in particular uphold the safety and distress requirements of the Global Maritime Distress and Safety System.

14. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

15. IT IS FURTHER ORDERED that Cruisephone is required to comply with the Commission's Rules and Regulations governing international carriers authorized under Title II of the Communications Act, as amended, including Part 61 of the Commission's Rules, 47 C.F.R. Part 61 and Section 203 of the Communications Act, 47 U.S.C. § 203; and Sections 43.51 and 43.61 of the Commission's Rules, 47 C.F.R. §§ 43.51 and 43.61.

16. This order is effective upon adoption. Petitions for reconsideration under Section 1.106 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[5] Service also shall be excluded to countries for which the United States has an embargo on telecommunications.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 9, 1994**

**Released: November 14, 1994**

Mr. Harold Brown, President
Gospel Music Television Network, Inc.
216 East Camden-Wyoming Avenue
Camden, DE 19934

Dear Mr. Brown:

This is in response to your letters of September 7 and October 4, 1994, requesting a waiver of Section 76.922(d)(3)(X) of the Commission's rules governing offset requirements by operators of revenues received from programmers,[1] as applied to cable operators' carriage of the planned Gospel Music Television Network ("GMT").

We understand that GMT has planned since mid-1992 to introduce a programming service to cable operators that will deliver gospel music videos as well as offer for sale to subscribers products related to gospel music.[2] You indicate that GMT will charge operators a license fee for carriage of GMT. You state that, if granted a waiver, GMT will "test the new channel," presumably by testing consumer demand for GMT's products. You state that GMT will share commissions on these sales with operators based on the amount of sales within each operator's zip code. In your letters, you request a waiver for a three-year period, and state that GMT will schedule home shopping programming for no more than fours hours per week during that period.

In support of your request, you note that the Commission has granted a limited waiver of offset requirements to MTV Networks, Inc. in order to permit that program service to conduct a marketing test of home shopping programming without offsetting, toward the eventual introduction of a separate, full-time home shopping channel.[3] You assert that the conditions surrounding GMT's waiver request are similar to those of MTV Networks' request; thus, GMT also should be granted a waiver of Section 76.922(d)(3)(X) of our rules. You also assert that the amount of passed-through programming costs, if a waiver is granted, will be "immaterial to the consumer" because the programming fee for GMT will be only $0.10 per subscriber per month. Finally, you contend that the home shopping commissions generated by this test will be extremely small in comparison to the programming fees paid by operators in exchange for carriage of GMT.[4]

Section 76.922(d)(3)(x) of the Commission's rules requires a cable operator to offset any revenues received from programmers against increases in programming costs in measuring costs eligible for external treatment. We have clarified that this requirement may be fulfilled on a channel-by-channel basis, under which any rebates or payments in consideration of carriage will be applied only to payments from the operator to that programmer.[5] This approach assures that there is no offset against programming expenses of payments by programming services that receive no compensation from cable operators, such as traditional full-time home-shopping services. You state, however, that these clarifications do not address GMT's situation, i.e., where a programming service that charges a programming fee also will test home shopping programming and share commissions on these home shopping sales with cable operators carrying the program service. Thus, you request a waiver of Section 76.922(d)(3)(x) of the Commission's rules as applied to GMT's planned marketing experiment.

The offset requirement of Section 76.922(d)(3)(X) is designed to protect subscribers' interests by ensuring that any operator expenses permitted to be passed-through to subscribers as external costs reflect only the operator's net costs of obtaining programming. Therefore, operators generally will be required tooffset home shopping revenues received from programmers in calculating costs accorded external treatment. However, we believe that the home shopping test described in your letters warrants a limited waiver of Section 76.922(d)(3)(X) of the Commission's rules. As in the case of MTV Networks' waiver request, we believe that GMT's plan involves several criteria that are essential before the Commission will consider a waiver of offset requirements. First, we understand that GMT has planned its home shopping test since July 1992, well before the April 1994 release of our revised regulations and accompanying forms in, particularly FCC Form 1210 on which the calculations governing offsetting first were described. Second, the proposal is not for a permanent departure from offset requirements; rather, it is for a marketing experiment that is intended only to gather market information to determine the potential for home shopping of products related to gospel music. Third, the record indicates that the amounts of home shopping revenues and sales commissions paid to operators will be *de minimis* and do not present a serious risk of harm to consumers. Fourth, we understand that GMT will remit any sales commissions to cable operators in a one-time payment, thus indicating that GMT's proposal does not contemplate an on-going

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[1] 47 C.F.R. § 76.922(d)(3)(x); *see also* Instructions for Line B1a, FCC Form 1210.

[2] In conversation with staff of the Cable Services Bureau, you have indicated that GMT is delaying the actual commencement of service until after your waiver request is resolved.

[3] *In re MTV Networks, Inc.* (released August 2, 1994).

[4] You propose the following scenario for carriage of GMT by a cable operator with approximately 200,000 subscribers. GMT will charge a license fee of $0.10 per subscriber per month, which will result in a monthly license fee of $20,000 for the operator. GMT expects to generate a maximum of $20,000 per month in home shopping revenues. The operator's 5% commission on these sales will equal $1,000. The sales commissions received by the operator ($1,000) thus will equal only 1/20 of the license fee paid in exchange for carriage of GMT ($20,000). Moreover, under this scenario, the sales commissions received by operators will equal only about one-half of one cent per subscriber per month.

[5] *In re QVC Network, Inc.* (released May 9, 1994, Cable Services Bureau); *In re The Home Shopping Network* (released May 9, 1994, Cable Services Bureau).

plan of payments to operators. Finally, we understand that the home shopping segments will be scheduled for only a few hours per week and for a limited number of months.

We will grant this limited waiver subject to the same conditions as that granted to MTV Networks. First, the waiver of offset requirements is intended to facilitate GMT's marketing experiment of home shopping. Therefore, the effective period for the waiver is limited to five months duration, commencing upon GMT's introduction of home shopping programming, and the home shopping segments shall be scheduled for no more than four hours per week. Sales commissions based on home shopping revenues generated outside these time periods will require offsetting. Second, we will require GMT to compensate operators only in a one-time payment at the end of the test period, rather than as part of an on-going regular payment plan. Third, we will require GMT to divide the home shopping commissions evenly among the operators carrying its program service based on subscriber totals, rather than based on sales amounts occurring within each operator's zip code area. We believe that these conditions will assure that GMT's proposal is intended merely as a marketing experiment rather than a permanent plan to compensate operators for carriage of GMT. Finally, we limit this waiver to the particular conditions described in this letter.[6] Under these specific conditions, we do not believe that the grant of this limited waiver will be detrimental to consumers.

Accordingly, we will grant a limited waiver of Section 76.922(d)(3)(x) of the Commission's rules to permit operators to receive commissions from GMT's marketing test of home shopping programming without offsetting such revenues against GMT's programming costs in determining costs eligible for external treatment.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

[6] Other parties seeking to introduce new programming services and share with operators the revenues generated by such services must obtain their own waivers of Section 76.922(d)(3)(X) of the Commission's rules concerning offset requirements.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 15, 1994**

**Released: November 21, 1994**

**CERTIFIED MAIL -- RETURN RECEIPT REQUESTED**

Mr. Timothy D. Martz 1800C3-M
Zephyr Broadcasting, Inc. 92060175
Licensee of WZNL(FM), Norway, MI
5595 Liberty Rd.
Chagrin Falls, OH 44022

Dear Mr. Martz:

This letter constitutes a Notice of Apparent Liability (NAL) for a forfeiture of $4,000 issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (47 U.S.C. Section 503(b)): $2,000 for your willful and repeated violation of Section 315(b) of the Communications Act (47 U.S.C. Section 315(b)), as implemented by Section 73.1940(b)(1) of the Commission's rules (47 C.F.R. Section 73.1940(b)(1)) and $2,000 for your willful and repeated violation of 73.1940(c) of the Commission's rules (47 C.F.R. Section 73.1940(c)).[1]

## BACKGROUND

This action results from a Commission investigation into the political programming practices of WZNL(FM). On March 10, 1992, we sent you a letter of inquiry regarding your political sales practices. On June 5, 1992, you responded, advising the Commission that WZNL sales personnel had failed to maintain a political file and that the records of political inquiries and contracts had been placed with other sales records and general advertising documents. You also stated that your investigation, which was based on the records that could be located, revealed several instances of overcharges, for which you are issuing rebates.

## DISCUSSION

### Lowest Unit Charge

Section 315(b) of the Communications Act of 1934, as amended, prohibits licensees from charging more than the lowest unit charge of the station for the same class and amount of time in the same time period.[2] In your response to the Commission's inquiry, you admitted that some candidates had been overcharged during the period preceding the primary and general elections. You stated that in the course of your review of the station's records, you found several instances in which the following candidates had been charged more than the lowest unit charge of the station for the same class and length of time in the same time period prior to the general election. You state that you are issuing rebates as follows:

| | |
|---|---|
| 1. Michael Kusz | $374.00[3] |
| 2. Lipe for Judge Comm. | $34.50 |
| 3. Mike Carey | $83.00 |

According to your correspondence, in each instance the station failed to identify lower rates offered to commercial advertisers for the same time and, as a result, overcharged the candidates. You also admit to overcharges prior to the primary election, but you provide no specific information. It appears, therefore, that you have violated the lowest unit charge provision of Section 315(b) of the Communications Act.

### Political File

The Commission's rules require licensees to keep and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests. 47 C.F.R. Section 73.1940(c). In your response to the Commission's inquiry, you admit that the station failed to maintain a political file in accordance with these regulations, but instead maintained the materials in other files. Your admitted failure to maintain a political file constitutes an apparent violation of Section 73.1940(c) of the Commission's rules.

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[1] In *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, *recon. denied*, 7 FCC Rcd 4611 (1992), the Commission revised and renumbered the various provisions of Section 73.1940 of the Commission's rules. The rules relevant to this forfeiture may now be found at Section 73.1942 (candidate rates) and Section 73.1943 (political file). The relevant provisions of previous Section 73.1940 relating to this NAL were not changed by the 1992 action.

[2] Section 315(b) states, in pertinent part:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed-
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period;
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> * * * *

[3] Our review of the political invoices for Mr. Kusz indicates that Kusz purchased a total of 18 spots on Saturday, November 3, and Sunday, November 4, 1990. Your review indicated that the lowest unit charge for spots running on these dates between 6:00 a and 3:00 p was $1.00, and you rebated Mr. Carey, another candidate, accordingly. As a result, Kusz should also receive a rebate down to $1.00 for his 6 spots that ran at $5.00 and six spots that ran at $7.00 between 6:00 a and 3:00 p on those dates, for an additional $60.00.

**FORFEITURE**

Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for a forfeiture of four thousand dollars ($4,000): two thousand dollars ($2,000) for your apparent willful and repeated violation of 47 U.S.C. Section 315(b) and 47 C.F.R. Section 73.1940(b)(1) (failure to charge candidates no more than the lowest unit charge of the station) during the 45 days preceding the August 7, 1990, primary and the 60 days preceding the November 6, 1990 general election; and two thousand dollars ($2,000) for your apparent willful and repeated violation of Section 73.1940(c) (failure to maintain a political file) during at least the same time period as the lowest unit charge violation.

The lowest unit charge violations cited herein appear similar to but not as egregious as those in *Lawson Broadcasting Company,* Memorandum Opinion and Order (released July 19, 1985), for which a $4,000 fine was issued for lowest unit charge violations under the then applicable statute. The Commission found the circumstances of that case particularly egregious because of the station's fundamental lack of understanding of the FCC's lowest unit charge rules and failure to assist the Commission's investigation. The political file forfeiture is similar to the political file violation in *Southern Arkansas Radio Corporation,* 6 FCC Rcd 5130 (1991), for which a $4,000 forfeiture was issued for both political file and public inspection file violations. That ruling did not apportion the forfeiture between the violations.

After considering the factors set forth in 47 U.S.C. Section 503(b),[4] as well as the foregoing precedents, we find that a fine in the amount of $4,000 is appropriate. Due to the absence of egregiousness in this case, as compared with *Lawson,* we believe a $2,000 fine for lowest unit charge violations is warranted. In addition, in light of the apportionment of a $4,000 fine in *Southern* between two violations, only one of which, the political file violation, is at issue in this case, we believe that a $2,000 fine for that violation is appropriate.

You are also directed to submit to the Commission within thirty (30) days of your receipt of this letter, a report specifying the refunds made to each of the candidates who purchased time during the period preceding the 1990 primary election, and any additional rebates made to those candidates purchasing time during the period preceding the 1990 general election required as a result of this *Order.*

With respect to the forfeiture imposed herein, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's rules are summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

attachment
cc: Brian Madden, Esq.

[4] In *United States Telephone Ass'n v. FCC,* No. 92-1321, D.C. Cir. July 12, 1994), the court set aside our *Policy Statement on Standards for Assessing Forfeitures,* 6 FCC Rcd 4659 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *revised,* 8 FCC Rcd 6215 (1993), in which we had established guidelines for determining appropriate forfeiture amounts for violation of various Commission rules and statutory provisions, including the LUC provision. In assessing this forfeiture, therefore, we have undertaken to apply directly the statutory factors in Section 503(b) to the particular facts of this case, giving due consideration to relevant intervening legislative changes and to our past decisions that predated the Policy Statement.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 15, 1994**

**Released: November 21, 1994**

**CERTIFIED MAIL -- RETURN RECEIPT REQUESTED**

Mr. Timothy D. Martz 1800C3-M
President 92060174
Fleet Broadcasting, Inc.
Licensee of WFNL(FM), Sturgeon Bay, WI
5595 Liberty Road
Chagrin Falls, Ohio 44022

Dear Mr. Martz:

This letter constitutes a Notice of Apparent Liability (NAL) for a forfeiture of $4,000 issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (47 U.S.C. Section 503(b)): $2,000 for your willful and repeated violation of Section 315(b) of the Communications Act (47 U.S.C. Section 315(b)), as implemented by Section 73.1940(b)(1) of the Commission's rules (47 C.F.R. Section 73.1940(b)(1)) and $2,000 for your willful and repeated violation of Section 73.1940(c) of the Commission's rules (47 C.F.R. Section 73.1940(c)).[1]

## BACKGROUND

This action results from a Commission investigation into the political programming practices of WFNL(FM). On March 10, 1992, we sent you a letter of inquiry regarding your political sales practices. On June 5, 1992, you responded, advising the Commission that WFNL sales personnel had failed to maintain a political file and that the records of political inquiries and contracts had been placed with other sales records and general advertising documents. You also stated that your investigation, which was based on the records that could be located, revealed several instances of overcharges, for which you are issuing rebates.

## DISCUSSION

**Lowest Unit Charge**

Section 315(b) of the Communications Act of 1934, as amended, prohibits licensees from charging more than the lowest unit charge of the station for the same class and amount of time in the same time period.[2] In your response to the Commission's inquiry, you admitted that some candidates had been overcharged during the period preceding the 1990 primary and general elections. You stated that in the course of your review of the station's records, you found several instances in which the following candidates had been charged more than the lowest unit charge of the station for the same class and length of time in the same time period prior to the general election. You state that you are issuing rebates as follows:

| | |
|---|---|
| 1. Jerome Van Sistine | $80.27 |
| 2. Jim Kanikula | $37.50 |
| 3. Toby Roth | $89.25 |
| 4. Jay Zahn | $12.50 |
| 5. Ruth Massart | $4.00 |

According to your correspondence, in each instance the station failed to identify lower rates offered commercial advertisers for the same time and, as a result, overcharged the candidates.[3] You also admit to overcharges prior to the primary election, but you provide no specific information. It appears, therefore, that you have violated the lowest unit charge provision of Section 315(b) of the Communications Act.

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[1] In *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992), the Commission revised and renumbered the various provisions of Section 73.1940 of the Commission's rules. The rules relevant to this forfeiture may now be found at Sections 73.1942 (candidate rates) and 73.1943 (political file). The relevant provisions of previous Section 73.1940 relating to this NAL were not changed by the 1992 action.

[2] Section 315(b) states, in part:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed-

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period;

* * * *

[3] The following two accounts were among the invoices that you supplied in response to our inquiry. They appear to be co-operative ventures and to reflect partial payments made by one of the advertisers. However, in each instance the invoice for the party who was to share the costs of the spots was not included in the package sent to the Commission. Please provide, within 30 days of the date of this letter, all information, including all relevant invoices necessary to establish the total amount paid for the spots listed on each invoice. If the invoices do not reflect spots being paid for by two or more parties, the rates below would establish the lowest unit charge for each relevant time period and rebates should be made accordingly.

Account No. 187
Time period - 10:00 a to 3:00 p
Length - 30 seconds
Contract run - 10/11/90 - 12/11/90
Rate - $3.00

Account No. 18
Time period - All dayparts
Length - 30 seconds
Contract run - 10/1/90 - 11/30/90
Rate - $1.25

**Political File**

The Commission's rules require licensees to keep and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests. 47 C.F.R. Section 73.1940(c). In your response to the Commission's inquiry, you admit that the station failed to maintain a political file in accordance with these regulations, but instead maintained the materials in other files. Your admitted failure to maintain a political file constitutes an apparent violation of Section 73.1940(c) of the Commission's rules.

**FORFEITURE**

Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for a forfeiture of four thousand dollars ($4,000): two thousand dollars ($2,000) for your apparent willful and repeated violation of 47 U.S.C. Section 315(b) and 47 C.F.R. Section 73.1940(b)(1), (failure to charge candidates no more than the lowest unit charge of the station) during the 45 days preceding the September 11, 1990, primary and the 60 days preceding the November 6, 1990, general election; and two thousand dollars ($2,000) for your apparent willful and repeated violation of Section 73.1940(c)(failure to maintain a political file) during at least the same time period as the lowest unit charge violation.

The lowest unit charge violations cited herein appear similar to but not as egregious as those in *Lawson Broadcasting Company*, Memorandum Opinion and Order (released July 19, 1985), for which a $4,000 fine was issued for lowest unit charge violations under the then applicable statute. The Commission found the circumstances of that case particularly egregious because of the station's fundamental lack of understanding of the FCC's lowest unit charge rules and failure to assist the Commission's investigation. The political file forfeiture is similar to the political file violation in *Southern Arkansas Radio Corporation*, 6 FCC Rcd 5130 (1991), for which a $4,000 forfeiture was issued for both political file and public inspection file violations. That ruling did not apportion the forfeiture between the violations.

After considering the factors set forth in 47 U.S.C. Section 503(b),[4] as well as the foregoing precedents, we find that a fine in the amount of $4,000 is appropriate. Due to the absence of egregiousness in this case, as compared with *Lawson*, we believe a $2,000 fine for lowest unit charge violations is warranted. In addition, in light of the apportionment of a $4,000 fine in *Southern* between two violations, only one of which, the political file violation, is at issue in this case, we believe that a $2,000 fine for that violation is appropriate.

You are also directed to submit to the Commission within thirty (30) days of your receipt of this letter, a report specifying the refunds made to each of the candidates who purchased time during the period preceding the 1990 primary election and any additional rebates made to those candidates purchasing time during the period preceding the 1990 general election required as a result of this *Order*.

With respect to the forfeiture imposed herein, you are afforded period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's rules are summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

enclosures
cc: Brian Madden, Esq.

[4] In *United States Telephone Ass'n v. FCC*, No. 92-1321, D.C. Cir. July 12, 1994), the court set aside our *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4659 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993), in which we had established guidelines for determining appropriate forfeiture amounts for violation of various Commission rules and statutory provisions, including the LUC provision. In assessing this forfeiture, therefore, we have undertaken to apply directly the statutory factors in Section 503(b) to the particular facts of this case, giving due consideration to relevant intervening legislative changes and to our past decisions that predated the Policy Statement.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-134**

In the Matter of

Amendment of Section 73.202(b), RM-8538
Table of Allotments,
FM Broadcast Stations.
(Burlington, Colorado)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: November 14, 1994; Released: November 22, 1994**

**Comment Date: January 12, 1995**
**Reply Comment Date: January 27, 1995**

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Bruce Corman, Kay Hanley and Charley P. Barnes ("petitioners") requesting the allotment of Channel 257C1 to Burlington, Colorado, as that community's second local FM service. Petitioners stated their intention to apply for Channel 257C1 if it is allotted to Burlington, and if authorized, to build a station promptly, as required by the Commission in the Appendix to the *Notice*.[1] *Technical Statement*

2. A staff review of the proposal reveals that Channel 257C1 can be allotted to Burlington, Colorado, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction, at coordinates North Latitude 39-18-18 and West Longitude 102-16-06.

3. We believe the public interest would be served by proposing the allotment of Channel 257C1 to Burlington, Colorado, since an interest has been expressed in providing a second local FM service to that community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Burlington, Colorado, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Burlington, Colorado | 281C1 | 257C1, 281C1 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 12, 1995**, and reply comments on or before **January 27, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, as follows:

Bruce Corman
Kay Hanley
Charley P. Barnes
c/o Charley P. Barnes
524 15th Street
Burlington, CO 80807

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Although the petitioners' request was submitted by Charley P. Barnes, he failed to include an affidavit verifying that the statements contained in the petition are accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919, n.41 (1990). Petitioners are requested to rectify this omission in their comments.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-135**

In the Matter of

Amendment of Section 73.202(b), RM-8541
Table of Allotments,
FM Broadcast Stations.
(Atkins, Arkansas)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: November 14, 1994; Released: November 22, 1994**

**Comment Date: January 12, 1995**
**Reply Comment Date: January 27, 1995**

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Atkins Broadcasting ("petitioner") requesting the allotment of FM Channel 257A to Atkins, Arkansas, as that community's first local aural transmission service. Petitioner stated its intention to apply for Channel 257A if allotted to Atkins, as requested.

**Technical Statement**

2. A staff analysis of the proposal reveals that Channel 257A can be allotted to Atkins in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 5.0 kilometers (3.1 miles) east of the community at coordinates 35-14-49 and 92-52-53. The site restriction is required to avoid a short-spacing to the licensed site of Station KMAG(FM), Channel 256C, Fort Smith, Arkansas, at coordinates 35-04-26 and 94-40-48.

3. We believe the public interest would be served by proposing the allotment of Channel 257A to Atkins, Arkansas, since an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Atkins, Arkansas, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Atkins, Arkansas | -- | 257A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 12, 1995**, and reply comments on or before **January 27, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Dan J. Alpert, Esq.
Law Office of Dan J. Alpert
1250 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-73**

In the Matter of

Amendment of Section 73.202(b), RM-8097
Table of Allotments,
FM Broadcast Stations.
(Nogales, Arizona)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 14, 1994; Released: November 22, 1994**

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 2485 (1993), issued in response to a petition filed on behalf of Felix Corporation ("petitioner") proposing the allotment of Channel 256A to Nogales, Arizona, as that community's second local FM service. Petitioner filed supporting comments in response to the *Notice*.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 256A to Nogales since it would provide an additional local aural transmission service to the community.

**Technical Statement**

3. As stated in the *Notice*, Channel 256A can be allotted to "Nogales consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, provided the transmitter is sited at least 2 kilometers (1.2 miles) east of the community[2] to avoid a co-channel short-spacing to a proposal to allot Channel 256B to Sonoita, Sonora, Mexico.[3] Additionally, since Nogales is located within 320 kilometers (199 miles) of the United States-Mexican border, concurrence of the Mexican government to this proposal was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 6, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Nogales, Arizona, as follows:

| City | Channel No. |
|---|---|
| Nogales, Arizona | 252A, 256A |

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 256A at Nogales, Arizona, will open on **January 6, 1995**, and close on **February 6, 1995**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 256A at Nogales, Arizona, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner's comments were late-filed. However, in accordance with Commission policy, since this proceeding is uncontested, we have accepted the comments for the purpose of allowing petitioner to restate its interest in applying for the channel. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988), *aff'd.*, 4 FCC Rcd 3412 (1989), *aff'd. sub nom. Amor Family Broadcasting v FCC*, 918 F.2d 960 (D.C. Cir. 1990)).

[2] Coordinates for Channel 256A at Nogales are 31-20-24 and 110-54-56.

[3] Coordinates for proposed Channel 256B at Sonoita are 31-51-52 and 112-41-30.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-91**

In the Matter of

Amendment of Section 73.202(b), RM-8498
Table of Allotments,
FM Broadcast Stations.
(Moapa Valley, Nevada)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 14, 1994; Released: November 22, 1994**

By the Acting Chief, Allocations Branch:

1. At the request of Quinton W. Goode ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3983 (1994), proposing the allotment of Channel 284A to Moapa Valley, Nevada, as the community's first local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 284A to Moapa Valley since an interest has been expressed in providing the community with its first local FM transmission service. Channel 284A can be allotted to Moapa Valley in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 6, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Moapa Valley, Nevada | 284A |

4. The window period for filing applications will open on **January 6, 1995**, and close on **February 6, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As requested in the *Notice*, petitioner complied with Section 1.52 of the Commission's Rules by providing a verification statement that the information contained in the petition is true to the best of his knowledge.

[2] The coordinates for Channel 284A at Moapa Valley are 36-31-30 North Latitude and 114-24-56 West Longitude.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**October 6, 1994**

**Released: October 6, 1994**

IN REPLY REFER TO:
1800B3-MJF/RDG

Henry M. Rivera, Esq.
Edwin N. Lavergne, Esq.
Rodney L. Joyce, Esq.
Ginsburg, Feldman and Bress, Chartered
1250 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20036

Lawrence Roberts, Esq.
Roberts and Eckard, P.C.
1919 Pennsylvania Avenue, N.W.
Suite 222
Washington, D.C. 20006

Thomas Jay Solomon, Esquire
8 Tobey Village Office Park
Pittsford, NY 14534

In re: WRQI(FM), South Bristol Twp, New York
Great Lakes Wireless Talking Machine Co.
BMPH-890613IB
BLH-900314KC
BPH-940531IE

Dear Counsel:

This refers to the following: (i) the above-captioned construction permit (BMPH-890613IB) which authorized the facilities on Channel 236B at Oak Mount Road, Bristol, NY; (ii) the above-captioned application for license (BLH-900314KC) filed to cover the facilities specified in construction permit BMPH-890613IB; (iii) the informal complaints of blanketing interference submitted by Debbie and Wayne Ward, Tom and Patsy Muller, Dorothy Talone and Julie Marble; (iv) the above-captioned minor change application (BPH-940531IE) for construction permit to correct the facilities specified in BLH-900314KC; (v) the Commission's July 14, 1994 letter which revoked WRQI's PTA at the Oak Mount site effective July 29, 1994; (vi) the Emergency Motion for Stay of the Commission's July 14, 1994 letter; (vii) the Opposition to the Emergency Motion for Stay; (viii) the Commission letters dated July 28, 1994, August 12, 1994 and September 9, 1994 which extended PTA until October 5, 1994; (ix) the August 3, 1994 Settlement Agreement between WRQI and the complainants; and (x) the September 29, 1994 letter filed on behalf of Great Lakes Wireless Talking Machine Company.

On August 12, 1994, the Commission found that the settlement agreement complied with the requirements of 47 C.F.R. § 73.3588, approved the agreement, and granted the translator construction permit, BPFT-930614TE. *Letter from Chief, Audio Services Division,* Reference Number 1800B4-MER, dated August 12, 1994. Pursuant to the terms of the settlement agreement, WRQI has ceased all operations at the Oak Mount Road PTA site and resumed operations from its currently licensed site (BMLH-871109KC) on September 29, 1994. This action has resolved the blanketing interference complaints against WRQI's construction permit facilities at the Oak Mount Road site. In the September 29, 1994 letter, Great Lakes Wireless Talking Machine Company requests the following: (i) dismissal of application for license BLH-900314KC; (ii) cancellation of construction permit BMPH-890613IB; and (iii) dismissal of minor change application for construction permit BPH-940531IE. We find that the grant of these requests, which were submitted pursuant to the settlement agreement, will serve the public interest.

Accordingly, the application for license BLH-900314KC, the minor change application for construction permit BPH-940531IE, all complaints of blanketing interference filed against WRQI regarding its operation from its Oak Mount Road PTA site, and the Emergency Motion for Stay of the Commission's July 14, 1994 letter ARE HEREBY DISMISSED, and construction permit BMPH-890613IB IS HEREBY CANCELLED. These actions are taken pursuant to 47 C.F.R. § 0.283.

Sincerely,

Dennis Williams
Chief, FM Branch
Audio Services Division
Mass Media Bureau

cc: EIC, Buffalo
Suffa & Cavell, Inc.
David Groth
Bruce Yerks
Rochester Telephone Company
Seneca-Gorham Telephone
Julie Marble
Dorothy Talone
Debbie and Wayne Ward
Tom and Patsy Muller

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CONTINENTAL CABLEVISION OF MASSACHUSETTS, INC., d/b/a CONTINENTAL CABLEVISION — Natick, MA 0141

Appeal of a Letter Ruling of the Massachusetts Community Antenna Television Commission

Request for Emergency Stay of a Letter Ruling of the Massachusetts Community Antenna Television Commission

**ORDER**

**Adopted: November 9, 1994 Released: November 10, 1994**

By the Chief, Cable Services Bureau:

1. Continental Cablevision of Massachusetts, Inc., d/b/a Continental Cablevision ("Continental"), filed on September 2, 1994 an Appeal of an August 4, 1994 letter ruling from Jill M. Reddish, Acting Commissioner of the Massachusetts Community Antenna Television Commission ("CATC"), which Continental characterizes as a refund order, directing Continental to comply with the refund provisions of the CATC's local rate order ("Local Rate Order").[1] Continental also filed a Request for Emergency Stay of the CATC's letter ruling regarding Continental's refund liability, pending the resolution of its Appeal, on August 11, 1994. The CATC did not submit any pleadings in opposition to either Continental's Appeal or its Request for Emergency Stay. For the reasons stated below, both the Appeal and the Request for Emergency Stay are dismissed.

2. The Local Rate Order, issued May 20, 1994, established Continental's rates for the basic service tier and associated equipment in Natick.[2] The Local Rate Order also required Continental to refund to its Natick subscribers any basic tier overcharges since September 1, 1993.[3] In its Appeal, Continental does not challenge any portions of the Local Rate Order. Rather, Continental challenges certain provisions of the August 4, 1994 letter ruling, in which the CATC rejected the refund plan which Continental had submitted to the CATC pursuant to the terms of the Local Rate Order. The CATC advised Continental that its refund plan, which proposed to limit the refunds ordered by the CATC, was inconsistent with the Local Rate Order. In its letter ruling, the CATC specifically stated, "in the absence of a stay issued by the [Massachusetts Community Antenna Television] Commission, Continental is bound to act in compliance with the [Massachusetts Community Antenna Television] Commission's May 20, 1994 Rate Order for Natick. This Rate Order states that Continental should issue . . . refunds to *all* subscribers in Natick who were charged more than the maximum permitted rate for the basic service tier."[4]

3. Under the Federal Communications Commission's rules, any participant in a ratemaking proceeding at the franchising authority level may file an appeal of the franchising authority's rate decision with the Commission within 30 days of the release of the text of the franchising authority's decision.[5]

4. The CATC's August 4, 1994 letter ruling is not a rate decision. It neither sets rates for Continental's basic service tier and associated equipment, nor orders Continental to issue any refunds. Rather, this letter ruling simply states that Continental is bound to act in compliance with the provisions of the Local Rate Order for the Town of Natick, including the provision directing Continental to refund any basic tier overcharges since September 1, 1993. If Continental believed that the CATC acted unreasonably in rendering the Local Rate Order for the Town of Natick, including the setting of Continental's basic tier and associated equipment rates and the ordering of refunds of all basic tier overcharges since September 1, 1993, then it should have appealed the Local Rate Order within the time frame established by the Commission's rules.[6] If Continental wished to appeal the Local Rate Order, such an appeal had to be filed no later than June 20, 1994. Continental's Appeal was received by the Commission on September 2, 1994, more than 70 days after Continental's deadline for filing an appeal of the Local Rate Order with the Commission. The Appeal is therefore dismissed as untimely filed.

5. In light of the dismissal of its Appeal, Continental's Request for Emergency Stay, pending the resolution of its Appeal, is rendered moot and, therefore, is dismissed.

6. Accordingly, IT IS ORDERED that the Appeal of Continental Cablevision of Massachusetts, Inc., d/b/a Continental Cablevision, dated September 2, 1994 is DISMISSED.

---

[1] The CATC issued the Local Rate Order for Natick on May 20, 1994. Continental was ordered to refund to its subscribers in Natick any basic tier charges since September 1, 1993, which were in excess of the initial permitted rates established in the Local Rate Order. Continental submitted its refund plan to the CATC on two occasions, once on June 7, 1994, and again on July 27, 1994. In the August 4, 1994 letter ruling, the CATC rejected Continental's proposed refund plan and directed Continental to comply with that portion of the Local Rate Order governing the issuance of refunds to subscribers in Natick.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] In the Local Rate Order, the CATC ordered Continental to issue "refunds to [its Natick] subscribers for that portion of previously paid rates determined by this Rate Order to be in excess of the initial permitted rates established by this Rate Order . . . ." Local Rate Order, at 16.

[4] Letter from Jill M. Reddish to Alan D. Mandl, Esq. (August 4, 1994) (discussing Continental's refund plan).

[5] *See* 47 C.F.R. § 76.944(b).

[6] *Id.*

7. IT IS FURTHER ORDERED that the Request for Emergency Stay of Continental Cablevision of Massachusetts, Inc., d/b/a Continental Cablevision, dated August 11, 1994 is DISMISSED.

8. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ULTRACOM OF MARPLE, INC.

Petition for Stay of Local
Rate Order of Township of
Haverford, PA

**ORDER**

**Adopted: November 9, 1994 Released: November 10, 1994**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On October 28, 1994, UltraCom of Marple, Inc. ("UltraCom"), the franchisee in the above-matter, filed a Petition for Stay of Enforcement Pending Review ("Petition") of a local Rate Order adopted by its franchising authority, the Township of Haverford, Pennsylvania ("the Township" or "Haverford"). In its petition, UltraCom seeks a stay of the local Rate Order pending the Commission's resolution of UltraCom's appeal on the merits.[1] On September 12, 1994, the Township of Haverford adopted a local Rate Order, under the FCC Form 393[2] regime, requiring UltraCom to establish a new rate schedule for its basic service tier and associated equipment and installations and to issue refunds to subscribers for charges in excess of the newly established rates.[3] On October 11, 1994, the Township adopted a resolution establishing November 14, 1994 as UltraCom's required compliance date. UltraCom asserts that if a stay of the local Rate Order is not granted before its compliance date, it will be required to implement refunds to subscribers totaling $60,000.[4] The Township has not filed an opposition to UltraCom's stay request.[5]

## II. BACKGROUND

2. UltraCom centers its petition for stay around four separate issues: (1) that the Township incorrectly set its rate for remote controls at zero; (2) that the Township incorrectly set its rate for home wiring repair, maintenance and rental at zero; (3) that the Township incorrectly set its rate for the basic service tier at $9.37; and (4) that the Township refused to disclose the basis for its decision. UltraCom claims that each of these actions were arbitrary and capricious and in violation of the Commission's rate regulations. Consequently, UltraCom argues that the Rate Order is defective and must be stayed.

3. Specifically, UltraCom argues that the Township's decision to set UltraCom's rates for remote controls and home wiring at zero was inconsistent with statutory and regulatory provisions allowing cable operators to recover their actual costs for regulated equipment and constitutes an unconstitutional taking of UltraCom's property without just compensation.[6] UltraCom alsoclaims that the Township acted unreasonably in setting its maximum permitted rate for the basic service tier below the rate calculated by UltraCom using the official FCC Form 393 spreadsheet, after the Township had requested that UltraCom file an official version of the Form 393 to replace its original unofficial filing.[7] Finally, UltraCom asserts that the Township's actual Rate Order did not disclose the basis for its decision and therefore failed to satisfy the procedural requirements of the Commission's rules.

## III. DISCUSSION

4. The Commission evaluates petitions for stay under well-settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[8] As described below, resolu-

[1] On October 12, 1994, UltraCom filed a Petition for Review of Rate Order.

[2] FCC Form 393 is the official form used by cable operators to determine whether their regulated rates for programming, equipment and installations were reasonable for the period beginning September 1, 1993 and ending May 15, 1994.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] According to UltraCom, these refunds, in the aggregate, will consist of approximately $1,000 in basic service tier refunds and approximately $59,000 in equipment-related refunds.

[5] The Township did file a Response to the Petition for Review of Rate Order on November 8, 1994.

[6] Haverford's Rate Order set UltraCom's rates for remote controls and cable home wiring at zero. UltraCom's actual rate for remote controls was $0.20 per month, while its maximum permitted rate for remote controls, as indicated by its Form 393, was $0.28 per month. UltraCom's actual rate for cable home wiring was $0.95 per month, while its maximum permitted rate for home wiring, as indicated by its Form 393, was $1.46 per month.

[7] Haverford's Rate Order set UltraCom's rate for the basic service tier at $9.37 per month. Presumably, the Township used this rate because it was the rate that UltraCom derived in its original form that it filed with the Township. However, UltraCom's original filing was not on an official version of the Form 393. After the Township requested that UltraCom file an official version of Form 393, UltraCom chose to file with the Township an official version of the form that is provided on a software package using a computerized spreadsheet created by the Commission. Using this spreadsheet, UltraCom derived a maximum permitted rate for the basic service tier of $9.38 per month.

[8] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

tion of this particular stay rests mainly on the strength of petitioner's argument concerning the first prong of this test.

5. Under the Cable Television Consumer Protection and Competition Act and the Commission's rules, cable operators are required to set their rates for regulated customer equipment and installations using a cost-based method.[9] In effect, cable operators must supply customer equipment, such as converters and remote controls, at rates based on their costs including a reasonable rate of return. In this case, UltraCom contends that the Township's setting of UltraCom's remote control rates at zero violates the Commission's rate regulations because it is not based on cost and therefore has no basis under the Commission's rules.[10] Because it is likely that Haverford's setting of UltraCom's remote control rates at zero is not based on cost, it appears to us that this action may not be in accordance with our rules and may not be within the scope of Haverford's regulatory authority.[11]

6. Because the Township requested that UltraCom submit an official version of FCC Form 393, it should not have set UltraCom's rate for the basic service tier according to the terms of the unofficial version of Form 393. Instead, it should have set the rate for UltraCom's basic service tier at the rate that UltraCom derived using the official FCC spreadsheet version of the form. Because a franchising authority should set rates based on the best information available, it is presumed that as between an official and an unofficial version of Form 393, the official version would constitute the best information available and therefore should be used to set rates. In the *Third Order on Reconsideration*, we decided that ". . . substitute forms are unacceptable."[12] We also ordered all subsequent forms to be filed on official versions and that all forms that had been filed on unofficial versions be refiled using the official versions of FCC Form 393.[13] This requirement cannot be overlooked by a franchising authority when determining an operator's reasonable rates, especially when the franchising authority, itself, has requested the refiling.

7. We grant the stay requested by UltraCom with regard to the local Rate Order adopted by the Township for UltraCom's basic service tier rates and associated equipment and installations. We conclude that Haverford appears to have misapplied our rules by setting UltraCom's rates for remote controls at zero and by setting UltraCom's rate for the basic service tier below the level permitted under our rules.[14]

8. During the period of this stay, UltraCom is ordered to deposit in an interest-bearing escrow account the total amount of money that the Township has ordered UltraCom to refund to its customers. Alternatively, UltraCom may elect to post a bond for the benefit of the Township. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if UltraCom is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the Township, on behalf of UltraCom's subscribers.[15]

9. Accordingly, IT IS ORDERED that the local Rate Order adopted by the Township of Haverford, Pennsylvania with respect to UltraCom of Marple, Inc.'s rates for basic tier service and associated equipment and installations is STAYED pending the resolution of UltraCom's Appeal.

10. IT IS FURTHER ORDERED that the amount of the refunds required by the Township of Haverford's Rate Order SHALL BE PLACED by UltraCom in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the Township of Haverford for the amount of money the Township has ordered UltraCom to refund, plus interest. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of UltraCom's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] *See* Communications Act § 623(b)(3); 47 U.S.C. § 543(b)(3); *Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, at ¶ ¶ 273-307 (released May 3, 1993) (*"Report and Order"*).

[10] *Id.*

[11] *See Century Southwest Cable Television Corporation of West Hollywood, CA*, DA 94-463 (released May 13, 1994).

[12] *Third Order on Reconsideration in MM Docket 92-266*, FCC 94-40 at ¶ 97 (released March 30, 1994) (*"Third Recon. Order"*).

[13] *Id.*

[14] The remote control and basic service tier issues together support the necessity of a stay and therefore we need not address the other two issues in this Order. Until our ruling on the appeal, we will withhold comment on the sufficiency of the Township's Rate Order and the propriety of the Township's actions with regard to the home wiring fee.

[15] *See Comcast Cablevision of Tallahassee, Inc.*, DA 94-1071 (Released, September 30, 1994), in which the Commission authorizes the operator to post a bond in lieu of establishing an escrow account.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**ET Docket No. 93-266**

In the Matter of

Review of the Pioneer's
Preference Rules

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 24, 1994; Released: November 3, 1994**

By the Commission: Chairman Hundt and Commissioner Chong not participating.

## INTRODUCTION

1. By this action, the Commission denies a petition for reconsideration of the *First Report and Order* (*First R&O*)[1] in this proceeding filed by CELSAT, Inc. (Celsat). In its petition, Celsat requests that its pending pioneer's preference request, PP-28, be considered in ET Docket No. 92-28.

## BACKGROUND

2. In the *Notice of Proposed Rule Making* (*Notice*)[2] in this proceeding, we sought comment on whether and how the pioneer's preference rules could be amended to take into account competitive bidding and our experience administering them, or whether they should be repealed. In the *First R&O*, we determined that we would not apply amendments to our rules to the three proceedings in which Tentative Decisions had been issued. Celsat requests reconsideration or clarification[3] of the *First R&O* insofar as that decision affects the inclusion or exclusion of Celsat's pioneer's preference request, PP-28, in Docket 92-28, which is one of the three proceedings in which a Tentative Decision had been issued and therefore, under the decision in the *First R&O*, would be considered under the existing pioneer's preference rules. Celsat argues that its pioneer's preference request[4] is pending in Docket 92-28 and therefore should be considered under the existing pioneer's preference rules.

## DISCUSSION

3. The *First R&O* did not address whether Celsat's pioneer's preference request is being considered in Docket 92-28 and had no effect on the status of Celsat's request. However, because Celsat argues that it is uncertain as to the status of the request, we are taking this opportunity to clarify that the request has been, and remains, pending in RM-7927, the proceeding in which Celsat's companion petition for rulemaking remains under consideration.

4. Celsat states that the Commission issued a *Public Notice* on March 11, 1992 "in an apparent response to Celsat's [pioneer's preference] filing...[that] established April 10, 1992 as the final day for filing any additional pioneer's preference requests" in Docket 92-28.[5] Celsat also argues that the Commission's Office of Engineering and Technology issued an *Order*[6] consolidating Celsat's pioneer's preference request with five other pioneer's preference requests in Docket 92-28, and that the Commission made an initial ruling on Celsat's companion petition for rule making in the *Notice of Proposed Rule Making and Tentative Decision* (*NPRM*)[7] in that docket.[8]

5. American Personal Communications (APC) and TRW Inc. (TRW) responded to Celsat's petition for reconsideration. APC states that Celsat's petition should either be considered in Celsat's pioneer's preference request proceeding or be treated as a request for clarification and promptly acted upon, to permit judicial review of the *First R&O* to proceed.[9] TRW opposes Celsat's petition, contending that Celsat's companion petition for rulemaking was dismissed in the *NPRM* in Docket 92-28 and that this dismissal was finalized in the *Report and Order*[10] in that proceeding, rendering Celsat's pioneer's preference request moot.[11]

6. Celsat's pioneer's preference request has been and remains pending in the RM-7927 proceeding that is addressing the portion of Celsat's petition for rule making not denied in Docket 92-28. Celsat's petition for rule making addressed a number of frequency bands. Several bands already were the subject of an ongoing proceeding and several were not. Those portions of Celsat's petition that addressed two bands being considered for low-Earth orbit satellite operations, 1610-1626.5 and 2483.5-2500 MHz, were considered in the proceeding initiated to address those bands, Docket 92-28. Because Celsat's petition as it related to those bands proposed a terrestrial component that was inconsistent with the international allocation of those bands, the portion of Celsat's petition that addressed those

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[1] 9 FCC Rcd 605 (1994).
[2] 8 FCC Rcd 7692 (1993).
[3] *See* Petition for Reconsideration or, in the Alternative Request for Clarification, filed on February 15, 1994 (Petition for Reconsideration).
[4] In the Matter of CELSAT, Inc. Request for a Pioneer's Preference Regarding its Petition for Rulemaking to Allocate Spectrum and to Establish Rules and Policies for a New Hybrid Personal Communications Network Service, filed on February 10, 1992. Celsat filed its petition for rule making (RM-7927) on February 6, 1992, and filed an amendment to its petition on July 21, 1993 and an amendment to its pioneer's preference request on December 22, 1993. A portion of Celsat's petition was dismissed in Docket 92-28; *see* para. 6, *infra*.
[5] Petition for Reconsideration at 2.
[6] *See Order Denying an Extension of Time for Comments and Replies*, ET Docket No. 92-28 and RM-7927, 7 FCC Rcd 2361 (1992).
[7] 7 FCC Rcd 6414 (1992).
[8] Petition for Reconsideration at note 11.
[9] APC Comments at 1.
[10] 9 FCC Rcd 536 (1994).
[11] TRW Opposition at 2.

bands was dismissed.[12] Had Celsat's petition addressed only those bands, its request for pioneer's preference also would have been dismissed, inasmuch as a pioneer's preference request is tied to adoption of rules consistent with the request.[13] However, since the portion of Celsat's petition addressing other bands remains pending in RM-7927, its companion pioneer's preference request also remains pending in that proceeding.

7. Celsat's arguments that its pioneer's preference request was associated with Docket 92-28, either in addition to or instead of RM-7927, are demonstrably incorrect. Celsat's request was placed on public notice on March 9, 1992. The public notice clearly stated on its face that the pioneer's preference request was filed in conjunction with Celsat's petition for rulemaking, RM-7927. Pioneer's preference requests pertaining to Docket 92-28 were separately placed on public notice and clearly marked with that docket number on the same day. There was no mention of Docket 92-28 in the *Public Notice* addressing Celsat's request, and no mention of RM-7927 in the *Public Notice* addressing Docket 92-28.

8. Additionally, an *Order* extending comment time periods cited by Celsat as consolidating the two proceedings clearly did not do so. While the *Order* denied an extension of time request that was filed with respect to the two separate proceedings, the request did not ask us to consolidate the two proceedings. Both the caption and text of the *Order*, as released March 27, 1992, made clear that RM-7927 and Docket 92-28 are separate and distinct.[14] The *Order* twice refers to the "proceedings," and paragraph 4 exclusively discusses Docket 92-28 while paragraph 5 separately discusses RM-7927. Not only would consolidation have been beyond the bounds of a routine ruling on an extension of time request that made no reference to consolidation, but the *Order* itself left no doubt that it did not address consolidation.

9. Finally, the *NPRM* and *Report and Order* in Docket 92-28 dismissed Celsat's petition for rulemaking only with respect to the 1610-1626.5 and 2483.5-2500 MHz bands. We explicitly stated therein that the surviving portion of Celsat's petition remained pending. Furthermore, Celsat's pioneer's preference request was not addressed in the *Tentative Decision* in Docket 92-28, and Celsat did not file comments nor request clarification of the status of its request despite its request not being addressed.

10. We do disagree with TRW that Celsat's pioneer's preference request is moot. Celsat's preference request must still be considered with respect to certain bands proposed by Celsat in its petition for rule making on which we have not ruled.

11. For the above reasons, we conclude that Celsat's pioneer's preference request remains pending before the Commission in RM-7927. Whether any changes to the pioneer's preference rules that may be adopted in the instant proceeding will apply to pending requests, such as Celsat's PP-28, is yet to be determined. Accordingly, IT IS ORDERED that the petition for reconsideration filed by CELSAT, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[12] *See NPRM*, ET Docket No. 92-28, *supra*, at note 15; and *Report and Order*, ET Docket No. 92-28, *supra*, at paras. 36-37.

[13] *See* 47 C.F.R. Section 1.402(a).

[14] We note that the *Order* was printed in the *FCC Record* with an incorrectly-placed caption. As printed in the *FCC Record*, the caption "ET Docket No. 92-28" is centered in boldface above the non-boldfaced caption "RM-7927." *See* 7 FCC Rcd 2361 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

RVC SERVICES, INC. File No. MSD-95-1

d/b/a Coastel
Communications Company

Petition for Stay of the Domestic
Cellular Telecommunications Service
Lottery Scheduled for October 19, 1994
for Wireline Block 306B for Unserved
Portions of the Gulf of Mexico

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 16, 1994; Released: November 17, 1994**

By the Chief, Mobile Services Division:

1. On August 10, 1994, the Commission issued a Public Notice announcing that it would conduct lotteries on October 19, 1994, for cellular authorizations for unserved portions of the Gulf of Mexico Service Area (GMSA).[1] The lottery has since been postponed to November 21, 1994.[2] On September 23, 1994, RVC Services, Inc., d/b/a Coastel Communications Company (Coastel), filed a petition seeking a stay of the scheduled lottery. For the reasons discussed below, we deny the Coastel petition.

2. At the time the Commission established Metropolitan Statistical Areas (MSAs) in connection with the licensing of cellular service, the entire gulf of Mexico was designated as one MSA.[3] Each cellular applicant defined the area within its market that it intended to serve with its cellular system, the Cellular Geographic Service Area (CGSA). Cellular operators providing service in the Gulf of Mexico could delineate their CGSAs coextensive with the entire Gulf of Mexico MSA (GMSA) regardless of the extent of the operator's actual signal coverage. In 1992 the Commission adopted a rule[4] redefining the CGSA for cellular licensees to be coterminous with actual areas of cellular signal coverage. The Commission's primary concern in making this change was the desire for the expeditious provision of service to those areas left unserved. On May 13, 1994, the United States Court of Appeals for the District of Columbia Circuit (the Court) instructed the Commission to vacate the provisions of Section 22.903(a), now Section 22.911(a), insofar as they apply to cellular systems licensed to serve the GMSA, pending reconsideration of the definition of CGSAs in the Gulf.[5]

3. Coastel, in its petition for stay, argues that the lottery for applications to serve areas in the Gulf should not be held until the Commission acts on the remand from the Court. Coastel argues that holding the lottery will result in the inability of the selectee to delineate a "legally acceptable CGSA." It contends that with the remand pending uncertainty exists as to what areas in the GMSA are unserved under the Commission's rules and thus may be the proper subject of an unserved filing for wireline block 306B. Coastel contends that it is highly likely to prevail on the merits and that a cellular operator licensed to serve the Gulf will be permitted flexibility to define its CGSA as coextensive with the entire GMSA regardless of the extent of the licensee's signal coverage in the GMSA. Coastel supports its contention by arguing that "cellular operators in the GMSA face operating conditions starkly different from those faced by land-based cellular carriers." Coastel contends that it is highly likely to prevail on the merits and that a cellular operator licensed to serve the Gulf will be permitted flexibility to define its CGSA as coextensive with the entire GMSA regardless of the extent of the licensee's signal coverage in the GMSA.

4. Coastel also argues that it will suffer irreparable injury if the lottery, as it pertains to unserved areas in the GMSA, is permitted to proceed prior to final action by the Commission with respect to its reconsideration of the issue remanded by the Court. Furthermore, Coastel argues that granting its petition will not harm unserved area applicants for the GMSA, particularly in light of the anticipated short delay the stay would cause, since a decision by the Commission should be imminent in the remand proceeding. Finally, Coastel contends that the public interest is best served by granting its petition because it will preserve the status quo pending final action by the Commission.

5. Coastel has failed to make a sufficient showing to justify the extraordinary relief it seeks. Any alleged uncertainty regarding which areas in the GMSA are unserved does not merit granting a petition for stay because the outcome of the lottery will be subject to the Commission's ultimate resolution of the issues remanded by the Court. The public notice announcing the lottery stated that an authorization will be conditioned upon the Commission's action on pending pleadings, which includes reconsideration of Section 22.903 of the Commission's Rules pursuant to the directive of the Court of Appeals for the D.C. Circuit. Applicants were aware of this fact at the time of the Lottery Notice and have proceeded, therefore, with full knowledge of potential outcomes.

6. The public interest would not be served by staying the lottery. In fact, should the Commission determine that the Gulf CGSA is not coterminous with the entire Gulf and the lottery had been stayed, resulting delays to expanded coverage to unserved areas in the Gulf would be counter to the public interest. Holding the lottery merely maintains a scheduled procedure that will expedite coverage in the event that Coastel does not prevail.

7. Coastel has failed to show that without granting this stay it will suffer irreparable injury if we do not grant the requested stay.[6] The lottery procedure neither constitutes,

[1] Lottery Notice; Mimeo 44186 (released Aug. 10, 1994).
[2] Lottery Notice; Mimeo 50186 (released Oct. 13, 1994).
[3] *See* 47 CFR § 22.2.
[4] 47 CFR § 22.903(a).
[5] *See Petroleum Communications, Inc. v. Federal Communications Commission*, No. 92-1670 and *RVC Services, Inc., D/B/A Coastel Communications Company v. Federal Communications Commission*, No. 93-1016, May 13, 1994.
[6] *See Virginia Petroleum Jobbers Association*, 259 F. 2d 921 (D.C. Cir. 1977)

nor automatically results in, the grant of a construction permit. Whether the lottery is held will not change the eventual outcome with respect to Coastel. The lottery merely initiates a process which will require some time before the issuance of authorizations. Even after that process is completed, it is clear that other relief is available should the petitioner wish to challenge the grant of a construction authorization to a lottery winner by filing a petition for reconsideration or an application for review of the grant.

8. Finally, Coastel has not demonstrated that it is highly likely to prevail on the merits of its case. Coastel provides no convincing argument that the acknowledged differences between land-based and water-based cellular operations warrant the extraordinary flexibility Coastel seeks with regard to the definition of CGSAs in the Gulf.

9. Accordingly, IT IS ORDERED that the request for stay filed by RVC Services, Inc. d/b/a Coastel Communications Company (File No. MSD-95-1) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MEREDITH/NEW HERITAGE
STRATEGIC PARTNERS, L.P.

Applications for Review of Orders of
Cable Services Bureau Denying
Motions To Accept Late-Filed Pleadings;
Re: Burnsville/Eagan Cable
Communications Commission
City of Columbia Heights, Minnesota
North Central Suburban Cable
Communications Commission
North Suburban Cable Communications Commission
Quad Cities Cable Communications Commission

**MEMORANDUM OPINION AND CONSOLIDATED ORDER**

**Adopted: October 12, 1994; Released: November 16, 1994**

By the Commission:

## I. INTRODUCTION

1. In this Consolidated Order, we grant the Applications for Review of Meredith/New Heritage Strategic Partners, L.P. ("Meredith"), filed on May 17, 1994, in which Meredith seeks review of the five Orders of the Cable Services Bureau ("Bureau"), released on May 13, 1994, denying Meredith's Motions to Accept Pleadings Filed One Day Late ("Motions to Accept").[1] Because it denied Meredith's Motions, the Bureau, by its five Orders, also dismissed, without consideration of the merits, Meredith's Emergency Petitions for a Stay of the rate orders of the local franchising authorities pending review and Meredith's Petitions for Review of those rate orders on grounds that the Petitions were late-filed. In this Consolidated Order, we also direct the Cable Services Bureau to proceed to consider and determine the Petitions for a Stay and the Petitions for Review.

## II. BACKGROUND

2. The five local franchising authorities, whose orders are the subject of Meredith's Petitions for Review, represent 26 Minnesota municipalities served by Meredith.[2] Each of the five local franchising authorities adopted local rate orders establishing rates for the basic service tier and an hourly service charge.[3] Refunds to cable subscribers were ordered based on the difference between the old and new rates and charges. Meredith did not file its Petitions for Stay and Review of the local orders until April 12, 1994, which was beyond the 30-day period allowed by our rules.[4] The Bureau dismissed Meredith's Petitions, without consideration of the merits, in the Orders denying the Motions to Accept. Subsequently, Meredith filed its Applications for Review of those rulings to this Commission.

3. Under our cable rate regulations, appeals from a decision of a local franchising authority must be filed with the Commission "within 30 days of the release of the text of the franchising authority's decision."[5] The evidence submitted by each of the five local franchising authorities in their Oppositions to Meredith's Motions was that each of the franchising authorities adopted its local rate order between February 16, 1994 and March 9, 1994 and that Meredith was provided a copy of the text of each decision at the time each was adopted.[6] Meredith did not file its appeals of each such local order until April 12, 1994, when it filed appeals with respect to all five. In response to the authorities' consolidated Opposition, Meredith stated that its appeals were filed after its receipt of a copy of the text of each of the local orders by letter dated March 10, 1994 and that none of the final orders was released until that date, when they were all released.[7]

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[1] The Bureau, by exercise of delegated authority, adopted five orders denying Meredith's Motions to File One Day Late by which Meredith sought review of the orders of the following local franchising authorities: *Burnsville/Eagan Cable Communications Commission*, DA 94-492 (May 13, 1994); *City of Columbia Heights*, DA 94-490 (May 13, 1994); *North Central Suburban Cable Communications Commission*, DA 94-493 (May 13, 1994); *North Suburban Cable Communications Commission*, DA 94-491 (May 13, 1994); and, *Quad Cities Cable Communications Commission*, DA 94-494 (May 13, 1994).

[2] The Burnsville/ Eagan Cable Communications Commission entered an order applicable to Meredith's operations in Burnsville and Eagan, Minnesota. The City of Columbia Heights entered an order applicable to Meredith's operations in the cities of Columbia Heights and Hilltop, Minnesota. The North Central Suburban Cable Communications Commission entered an order applicable to Meredith's operations in the cities of Blaine, Centerville, Circle Pines, Coon Rapids, Ham Lake, Lexington, Lino Lakes, and Spring Lake Park, Minnesota. The North Suburban Cable Communications Commission entered an order applicable to Meredith's operations in Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, St. Anthony, and Shoreview, Minnesota. The Quad Cities Cable Communication Commission entered an order applicable to Meredith's operations in Anoka, Ramsey, Champlin, and Andover, Minnesota.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act of 1934, *as amended*, § 623(b), 47 U.S.C. § 543(b).

[4] *See* Paragraph 3, *infra*.

[5] 47 C.F.R. § 76.944(b) (1993).

[6] Local authorities' Oppositions to the Motions of Meredith, 2-3. Burnsville/Eagan adopted its rate order at a public hearing held March 3, 1994; The City of Columbia Heights adopted its order on February 28, 1994; North Central Suburban adopted its order on February 16, 1994; North Suburban adopted its order on March 3, 1994; and Quad Cities adopted its order on February 17, 1994.

[7] Meredith Replies to Oppositions, 3.

4. The Bureau concluded that Meredith had submitted its pleadings at least one day late and, arguably, between four and 25 days late, depending on the date of the local order, since it was provided with copies of orders at various times prior to March 10, 1994. The Bureau concluded that even if all five orders were deemed to have been received on March 10, Meredith had filed its appeals one day late. The Bureau further concluded that good cause had not been shown for the late filings. Accordingly, the Motions to Accept were denied, and the Petitions for Review andStay were dismissed.[8] Here, Meredith seeks review of the Orders of the Bureau.

5. Meredith filed its Applications for Review of each of the five Bureau Orders on May 17, 1994 and submitted Supplements to those Applications on May 19, 1994.[9] On May 26, 1994 the five local franchising authorities submitted an Opposition to the Applications for Review.[10] Meredith then filed a Reply to that Opposition on June 7, 1994.

## III. DISCUSSION

6. As noted above, our rules provide 30 days from the date of release of the text of the franchising authority's decision for the filing of an appeal by the cable operator of that decision to the Commission. This time period is not set forth in the 1992 Cable Act, but was adopted by the Commission via rulemaking.[11] Where the time limit is not set by statute, but is regulatory in nature, the Commission may exercise its discretion and accept late-filed materials in appropriate circumstances, upon a showing of good cause.[12] Application of this standard varies in different circumstances. For example, with respect to the timely filing of applications, the Commission requires that applicants seeking a waiver of such filing deadlines must demonstrate "unusual or compelling circumstances" for their waiver requests to be granted.[13] Those circumstances must involve "a calamity of a widespread nature that even the best of planning could not have avoided," such as an earthquake or a city-wide power outage which brings transportation to a halt.[14]

7. In demonstrating good cause in connection with adjudicatory pleadings, a party before the Commission must provide a legitimate reason for not being able to file pleadings within the time specified.[15] Those reasons may differ depending on the circumstances. Generally, however, miscalculation of days within which to file,[16] the failure of courier services,[17] computer and copying equipment malfunctions,[18] and other aspects of document preparation and filing do not constitute "good cause."

8. Applicants in these proceedings have provided additional evidence in their appeals that they did not provide the Bureau in their initial appeals of the local orders. That evidence indicates that applicants did not have the texts of the final orders of the local authorities prior to March 10, 1994, despite the local authorities' initial arguments to the contrary. In its Applications for Review, Meredith has attached copies of draft orders and final orders that demonstrate that the text of the orders released between February 16 and March 9, 1994 were drafts which were changed by the local franchising authorities prior to release of the final documents on March 10, 1994. Accordingly, Meredith can not be said to have had the "text" of the local orders prior to that time. However, we find that Meredith was still one day late in submitting its appeals of the local orders. Meredith asserts that the lateness was due to a malfunction in Meredith's counsel's computer system which delayed Meredith's efforts to file its pleadings until 5:34 p.m. on the due date.[19] 8The Commission's rules require submission of pleadings before 5:30 p.m.[20] Meredith notes in its Petition for Stay that the franchising authority was timely served by mail in accordance with the Commission's rules.[21]

9. We agree with the Bureau that, consistent with Commission precedent, Meredith has not made a showing of good cause sufficient to obtain a waiver of the deadline for filing an appeal of a local cable rate order. We have previously held that a computer malfunction which delays filing is not an adequate reason to waive a filing deadline in an adjudicatory proceeding.[22] However, we also agree with Meredith that the Commission has on at least one occasion waived a filing deadline in circumstances similar

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[8] *See supra* footnote 1.

[9] In its Applications for Review, Meredith argues that the 30-day appeals period did not begin to run until March 10 and that the Bureau should not have denied Meredith's motion since Meredith's late-filing was non-preiudicial and *de minimis*. The Supplements attach minutes from a meeting of the North Central Suburban Cable Communications Commission in which counsel for the franchising authorities informed the Commission that the "30-day deadline for Meredith to appeal the Commission's action began on March 11, 1994." Supplements to Application for Review, 2.

[10] In response to Meredith's argument, in support of its position, that counsel for the franchising authorities believed that the 30-day period began on March 11, 1994, the local authorities state that, while counsel for the local authorities initially misinterpreted the rule, Meredith and not the local authorities are responsible for calculating its own appeal deadlines. Opposition to Application for Review, 12-13.

[11] 47 C.F.R. §76.944(b) (1993); *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, ¶ 147 and accompanying footnote 394, 8 FCC Rcd. 5631 (1993).

[12] *Compare Commonwealth Telephone Co.*, 4 FCC Rcd. 5299, 66 RR2d 1309 (1989)(regulatory deadline); *with Mary R. Kupris*, 5 FCC Rcd 5142, 68 RR2d 63 (1990) (subsequent history omitted) (statutory deadline).

[13] Public Notice, FCC 85-534 (36206), October 2, 1985; 58 RR2d 1706 (1985).

[14] *Id.*

[15] *El Paso Cablevision, Inc.*, 57 FCC2d 95, 35 RR2d 1405 (1975).

[16] *C . Investments, Inc.*, FCC Rcd 3741, 67 RR2d 1648 (Rev. Bd., ").

[17] *Kennebec Valley TV Inc.*, 3 FCC Rcd 4522, 65 RR2d 149 (1988).

[18] *Mary R. Kupris*, 5 FCC Rcd 5142, 68 RR2d 63 (1990) (subsequent history omitted).

[19] Counsel for Meredith so certifies in Meredith's Motions to Accept Pleading Filed One Day Late, 1. ("Because of additional time taken to correct a software malfunction..., which prevented the attached Petition from being printed out without risking the possibility of losing the document entirely, counsel arrived at the FCC at 5:34 p.m. and was denied admittance to the Secretary's office...")

[20] *See* 47 C.F.R. §0.403 and §1.4(f).

[21] Meredith's Motions To Accept Pleading Filed One Day Late, 1.

[22] *Mary R. Kupris*, 5 FCC Rcd 5142, 68 RR2d 63 (1990) (subsequent history omitted).

to those in the case before us.[23] While the decision in *Ellis Thompson* is clearly inconsistent with the body of case law on what constitutes good cause for waiver of a filing deadline, we understand the confusion *Ellis Thompson* may have engendered. In light of this possible confusion, we hereby overrule that portion of the decision in Ellis Thompson which deals with the issue of good cause for late-filed pleadings. Henceforth, we intend to strictly apply the good cause standard in connection with filing deadlines for pleadings which initiate adjudicatory proceedings, including appeals from local rate orders under the 1992 Cable Act. However, because Meredith may have relied on the decision in Ellis Thompson, we will not apply this strict good cause standard to the case before us.[24]

10. We direct the Bureau to proceed with consideration of the issues presented in the Petitions for Stay and Petitions for Review submitted by Meredith. All interested parties are advised, however, that after the release date of this Order, the Commission will look with disfavor at petitions seeking review of local franchising authority decisions that are filed out-of-time, regardless of the degree of lateness. Any such late-filed pleadings must be accompanied by the appropriate motions demonstrating good cause why the Commission should hear the matter. In order to establish good cause, the petitioning party must cite the intervention of something beyond the control of the party which could not have been foreseen, and for which no corrective action could have been taken. We reiterate that, generally, reports of the failure of courier services, computers, and other aspects of document preparation and filing will not be considered demonstrations of good cause.

11. Accordingly, IT IS ORDERED that the Applications for Review filed by Meredith/New Heritage Strategic Partners, L.P. ARE GRANTED.

12. IT IS FURTHER ORDERED that the Orders of the Cable Services Bureau denying the Motions of Meredith to file One Day Late ARE REVERSED and that the Motions ARE GRANTED. The Cable Services Bureau is directed to proceed with its consideration of Meredith's Petitions for Stay Pending Review and Meredith's Petitions for Review in accordance with our rules.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[23] In its Applications for Review, Meredith cites *Ellis Thompson Corp.*, 7 FCC Rcd 3932, 3936 n.2 (1992) (subsequent history omitted), which involved an application for review of an order of the Common Carrier Bureau which granted a cellular system license to Ellis Thompson Corporation. The application for review was filed one day late due to petitioner's miscounting the days within which to file.

[24] *See Green Country Mobilphone, Inc. v. FCC*, 765 F.2d 235 (D.C. Cir. 1985)

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Alfred, New York) — **MM Docket No. 91-339** RM-7857

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Minetto, New York) — **MM Docket No. 93-103** RM-8206

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Athens, Ohio) — **MM Docket No. 93-165** RM-8247

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Norlina, North Carolina) — **MM Docket No. 93-184** RM-8277

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Point Arena, California) — **MM Docket No. 93-196** RM-8275

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Isleboro and Winter Harbor, Maine) — **MM Docket No. 93-203** RM-8245 RM-8340

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Hermantown, Minnesota) — **MM Docket No. 93-206** RM-8284

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Bonanza, Keno, Lakeview, Malin and Merrill, Oregon) — **MM Docket No. 93-208** RM-8346 RM-8348 RM-8281 RM-8349 RM-8347

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Balsam Lake, Wisconsin) — **MM Docket No. 93-213** RM-8351

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Grand Gorge, New York) — **MM Docket No. 93-217** RM-8286

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Houston, Alaska) — **MM Docket No. 93-220** RM-8293

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Jeffersonville, New York) — **MM Docket No. 93-237** RM-8312

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Templeton, California) — **MM Docket No. 93-238** RM-8305

Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Quincy, Washington) — **MM Docket No. 93-239** RM-8313

Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Taylorville, Illinois) — **MM Docket No. 93-256** RM-8326

## ORDER

**Adopted: November 14, 1994; Released: November 23, 1994**

By the Acting Chief, Allocations Branch:

1. On February 25, 1994, the Commission issued a Public Notice[1] announcing a freeze on the filing of applications for new FM stations. This action was taken in response to the United States Court of Appeals' holding in *Bechtel v. FCC*, 10 F. 2d 875 (D.C. Cir. 1993). As a result, the application filing windows in the above-listed proceedings were stayed. Since the freeze was lifted on August 4, 1994,[2] we are opening a 30-day application filing window for the communities and channels listed below.

| Community | Channel No. |
|---|---|
| Houston, Alaska | 221A |
| Point Arena, California | 272B1 |
| Templeton, California | 263A |
| Taylorville, Illinois | 232A |
| Isleboro, Maine | 288B1 |
| Winter Harbor, Maine | 249A |
| Hermantown, Minnesota | 221A |
| Alfred, New York | 270A |
| Grand Gorge, New York | 287A |
| Jeffersonville, New York | 271A |
| Minetto, New York | 293A |
| Norlina, North Carolina | 232A |
| Athens, Ohio | 240A |
| Bonanza, Oregon | 275A |
| Keno, Oregon | 253A |
| Lakeview, Oregon | 237C2 |
| Malin, Oregon | 263A |
| Merrill, Oregon | 289A |
| Quincy, Washington | 240C3 |
| Balsam Lake, Wisconsin | 285C3 |

2. The window period for filing applications will open on **January 6, 1995**, and close on **February 6, 1995**.

3. For further information concerning this *Order*, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] *FCC Freezes Comparative Proceedings*, FCC 94-41, February 25, 1994.
[2] *Modification of FCC Comparative Proceedings Freeze Policy*, FCC 94-204, August 4, 1994.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GN Docket No. 94-96**

In the Matter of

Inquiry into alleged abuses of
the Commission's auction
processes by applicants for
licenses in the Interactive
Video and Data Services

**ORDER**

**Adopted: November 16, 1994; Released: November 18, 1994**

By the Commission:

1. The Commission has before it a "Request for Immediate Commission Action." The Request was tendered for filing in this non-public inquiry by IVDS Enterprises Joint Venture on November 1, 1994. The inquiry is being conducted pursuant to Section 403 of the Communications Act, of 1934, as amended, 47 U.S.C. § 403. The "Request" asks the Commission to immediately conduct IVDS reauctions in markets where there have been defaults and restrict participation therein to *bona fide* applicants; to accord a non-defaulting auction bidder in a market where a default has occurred the opportunity to secure a winning bid reduction; and to grant a credit against all *bona fide* licensees' bids. The Request for relief is beyond the scope of this investigatory fact finding proceeding because it seeks special relief in the nature of adjudicatory action with respect to certain IVDS licenses. The Request will, therefore, be dismissed.

2. ACCORDINGLY, IT IS ORDERED, that the Request for Immediate Commission Action, tendered for filing by IVDS Enterprises Joint Venture on November 1, 1994, IS DISMISSED without prejudice to being refiled outside this proceeding with service on all IVDS license bidders who defaulted and who would be affected by the Request.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**ERRATUM**

**Released: November 23, 1994**

**ALLTEL TELEPHONE SYSTEMS**
**FILES ITS INITIAL COST ALLOCATION MANUAL**
**PUBLIC COMMENT INVITED**

In a public notice released November 14, 1994, (DA 94-1220) the Commission sought comment on Alltel Telephone Systems' initial cost allocation manual. The AAD file number was listed as AAD 94-146. The corrected AAD file number is AAD 94-147.

For further information contact Alicia Dunnigan at (202) 418-0807.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

PRIME CABLE OF CHICAGO, INC.

Petitions for Reconsideration
of Certification of the
City of Chicago, Illinois
to Regulate Basic Cable Rates
(IL0984, IL0985)

## MEMORANDUM OPINION AND ORDER

**Adopted: November 14, 1994; Released: November 18, 1994**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On December 27, 1993 and February 8, 1994, Prime Cable of Chicago, Inc. ("Prime Cable") filed timely petitions for reconsideration challenging the certifications of the City of Chicago, Illinois (the "City") to regulate rates for basic cable service and associated equipment in the two franchise areas in the City which are served by Prime Cable.[1] In addition, Prime Cable submitted responses to the Bureau's subsequent requests for additional information and clarification.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless the franchising authority has actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the effective date of certification.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

## II. DISCUSSION

3. Prime Cable argues that, in both franchise areas, its cable system is subject to effective competition because it serves fewer than 30% of the households in each franchise area.[7] Prime Cable claimed that it serves 27.1% of the households in franchise area IL0984 and 23.3% of the households in franchise area IL0985. Prime Cable explained that, in deriving these percentages, it included commercial establishments in its subscriber and household totals. Prime Cable also included vacant housing units in its household totals.[8]

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, exists in the franchise area.[10] Based on the evidence, we find that Prime Cable has failed to meet this burden. First, Prime Cable improperly included commercial establishments in calculating its penetration levels. In the *Third Order on Reconsideration*, the Commission concluded that Congress intended the term "household," as used in the definition of effective competition, to have the same meaning as in the 1990 Census.[11] The 1990 Census defined the term as "all the persons who occupy a housing unit."[12] Thus, commercial establishments are not "households" for purposes of determining effective competition, and Prime Cable should not have included them in its subscriber and household totals.

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[1] The City filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") for the franchise area designated as IL0984 on November 10, 1993, which became effective on December 10, 1993. The FCC Form 328 for the franchise area designated as IL0985 was filed on December 27, 1993 and became effective on January 26, 1994.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30% of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. § 76.905(a) and (b)(1).

[8] In response to an inquiry from the Cable Services Bureau, Prime Cable submitted a letter on August 30, 1994 explaining that vacant housing units were included in its household totals.

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

[11] *Third Order on Reconsideration*, MM Docket Nos. 92-266, 92-262, 9 FCC Rcd 4316, 4324 (1994).

[12] Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

5. Second, even with the exclusion of commercial establishments, we find that Prime Cable failed to measure its penetration level in accordance with our rules. In letters sent on August 10, 1994 in response to inquiries by the Cable Services Bureau, Prime Cable attached exhibits which provided penetration levels that excluded commercial entities and were limited to residences only. However, the residential figures that were provided cannot serve as a basis for determining effective competition because they included vacant housing units.[13] The Commission has clarified that the term "household" does not include vacant housing units.[14] The Commission reasoned that "[p]eople who are not present cannot be presumed to be choosing local competitive alternatives."[15] Therefore, although Prime Cable's exhibits did provide evidence of its penetration levels exclusive of commercial entities, the evidence is inconclusive because it included vacant housing units.

6. Based on the evidence, we find that Prime Cable has not demonstrated that it is subject to effective competition in either franchise area IL0984 or franchise area IL0985. Thus, its petitions are denied.

## III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by Prime Cable of Chicago, Inc. challenging the certification of the City of Chicago, Illinois to regulate basic cable service rates in the franchise areas designated as FCC Community ID Nos. IL0984 and IL0985 ARE DENIED.

8. IT IS FURTHER ORDERED that the automatic stay of rate regulation, imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c), IS TERMINATED.

9. IT IS FURTHER ORDERED that Prime Cable shall file the required rate justifications on the applicable forms with the City of Chicago within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the City of Chicago that it is regulating Prime Cable's rates, whichever is later.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] *See* note 8, *supra*.
[14] *Third Order on Reconsideration* at 4324.
[15] *Id.*

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**ERRATUM**

**Released: November 25, 1994**

**Carriers File Revisions**
**To Their Cost Allocation Manuals**
**Public Comment Invited**

In a public notice released October 27, 1994, (DA 94-1167) the Commission sought comment on cost allocation manual revisons filed by several local exchange carriers. Comments were requested by **November 21, 1994**, and replies were requested by **December 26, 1994**. The corrected reply date is **December 6, 1994.**

For further information contact Sherice Reams at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

BT North America Inc. — File No. I-T-C-93-126

Application for Authority under Section 214 of the Communications Act to Provide International Resale Services as a Nondominant Common Carrier

**ORDER AND CERTIFICATION**

**Adopted: November 1, 1994; Released: November 14, 1994**

By the Chief, International Bureau:

## I. INTRODUCTION

1. The above-captioned application filed by BT North America (BTNA)[1] requests authority to resell, as a nondominant carrier: (i) switched services between the United States and various international points; (ii) international private lines for the provision of non-interconnected private line services between the United States and Australia, Canada, France, Germany, the Netherlands, Sweden and the United Kingdom; and (iii) international private lines, interconnected at one-end or both ends to the public switched network, for the provision of switched services between the United States and Canada and the United Kingdom.

## II. BACKGROUND

2. We placed the original application on public notice on March 17, 1993. We received six petitions to deny or comments in! opposition,[2] and three other sets of comments.[3] Subsequently, BTNA filed an opposition to the petitions to deny and a response to the comments. We received ten filings[4] responding to BTNA's pleadings.

3. On February 4, 1994, BTNA filed a request that the Commission expedite action on those portions of its application referenced above as (i) and (ii).[5] In that request, BTNA also states that it would accept dominant carrier regulation on all of its proposed routes to facilitate expeditious treatment of those portions of its application.[6]

## III. DISCUSSION

4. The majority of the commenters in this proceeding focus on that portion of BT's application which requests authorization for resale of international private lines for the provision of switched services, and regulation as a nondominant carrier. Pursuant to BTNA's request to bifurcate this proceeding, we defer these portions of its application and address only its request for authorization to resell switched services and private lines for the provision of non-interconnected private line services.

5. AT&T opposes BTNA's application arguing that U.S. carriers do not have comparable opportunities to compete in the United Kingdom where BTNA's parent, British Telecommunications, plc., is the dominant service provider for telecommunications services. We have not to date adopted a policy requiring comparable market access as a condition of entry into the U.S. telecommunications market by foreign carriers, although AT&T has filed a petition for rulemaking asking us to adopt such a standard.[7]

6. Traditionally, we have examined applications filed by foreign carriers on a case-by-case basis, balancing our policy in favor of open entry against the potential for discrimination by a foreign carrier against unaffiliated U.S. carriers.[8] Following this approach, the Commission has

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[1] BTNA, a Delaware corporation, is a wholly-owned subsidiary of BT USA Holdings (BT USA), a Delaware corporation. BT USA is a wholly-owned subsidiary of British Telecommunications plc (BT), a company organized under the laws of England and Wales. BT is the dominant provider of local, long distance and international telephone service in the United Kingdom.

[2] MCI Communications Corporation (MCI), Sprint Communications Company L.P. (Sprint), AT&T, Graphnet, Inc. (Graphnet), Business Telecom, Inc. (BTI) and Securities Communications Network (SCN) each filed a petition to deny or comments in opposition.

[3] The British Embassy filed comments in support, while ACC Global Corp. (ACC) filed comments in conditional support. Alanna, Inc. also filed comments which are not intended to either support nor oppose the application, but to distinguish its own Section 214 international private line resale application from BTNA's. The Commission subsequently granted the applications of both ACC and Alanna. *See* notes 6 and 10, *infra*.

[4] AT&T, Sprint, MCI, and SCN each filed a reply to opposition. ACC and the British Embassy filed reply comments. In addition, the Information Industry Association (IIA) and the Information Technology Association of America (ITAA) (takes no position, but urges Commission to act promptly) filed comments. Finally, AT&T replied to *ex parte* comments filed by the British Embassy.

[5] *See* Letter from Joan M. Griffin, BTNA to George S. Li, Chief, International Facilities Division, Common Carrier Bureau (February 4, 1994). On March 8, 1994, BTNA filed a letter requesting immediate action on its bifurcation request. *See* Letter from Joan M. Griffin, BTNA to George S. Li, Chief, International Facilities Division, Common Carrier Bureau.

[6] We placed BTNA's request on public notice on February 8, 1994 (Report No. I-6925). In response, we received comments in opposition from AT&T, ACC, SCN and Graphnet. In light of ACC's subsequent pleadings supporting a U.K. equivalency finding by the Commission in which it states that is satisfied with both its interconnection agreement with BT and its receipt of a waiver of the access deficit contribution from the U.K. Office of Telecommunications (Oftel), we believe that ACC's comments are now moot. *See ACC and MFS Report on Interconnection*, File I-T-C-93-035. Cable & Wireless, Inc. (CWI) filed comments in response to AT&T's comments in opposition. BTNA then filed reply comments to which Sprint and ACC replied. In a subsequent *ex parte*, AT&T filed supplemental comments

[7] *See* AT&T's *Petition for rulemaking on market entry and regulation of international common carriers with foreign carrier affiliations*, RM-8355 (filed September 22, 1993) (*see* Public Notice of October 1, 1993).

[8] AmericaTel Corporation, 9 FCC Rcd 3993, 3996 (1994) (citing Telefonica Larga Distancia de Puerto Rico, 8 FCC Rcd 107, 108 (1992)).

previously authorized other foreign-owned U.S. carriers, such as Cable & Wireless, Inc., to engage in international resale of switched and non-interconnected private lines to numerous countries.[9] There may, indeed, be a need to take a comprehensive look at how we evaluate foreign carrier entry into the U.S. telecommunications market. But the development and application of market access standards would be a broad policy change appropriately done in a rulemaking proceeding, not in an individual Section 214 proceeding. We thus evaluate BTNA's application in accordance with existing Commission precedent.

7. Moreover, even if we were to consider foreign market access in determining whether the public interest would be served by the partial grant of this application, U.K. regulatory and market conditions for U.S.-based carriers seeking to engage in the resaleof the international services (for which BTNA currently seeks FCC authorization pursuant to its bifurcation request) would weigh in favor of the applicant. Although not the subject of this portion of BTNA's application, the Commission has recently undertaken an in-depth review of the U.K. regulatory and market conditions surrounding international private line resale for switched services, including those issues raised by AT&T in its comments.[10] Based on that review, the Commission determined that the United Kingdom affords U.S.-based carriers opportunities to resell private lines to provide switched services equivalent to those available under U.S. law.

8. More specifically, the U.K. permits any party, including ACC and AT&T, to resell IMTS as well as non-interconnected or one-end interconnected private lines without any prior U.K. government authorization under an existing class license--the U.K. Telecommunication Services License. It is also noteworthy that the U.K. telecommunications market is one of the most liberalized in the world, and certainly the most liberalized in the European Union. In fact the United Kingdom has few regulatory barriers to entry and has no foreign ownership limitations. The United Kingdom permits competition in all services, with the significant exception of international facilities-based services. As the Commission has noted previously, the U.K. government has taken considerable steps toward creating a regulatory regime under which effective competition to BT is likely to emerge, particularly with regard to the interconnection and access deficit contribution regimes. Examples of the openness of the U.K. telecommunications market include the Department of Trade and Industry's recent grant of several domestic facilities-based and international simple resale licenses to U.S. carriers, including Sprint, WorldCom, MFS Inc., ACC Global Corp., and City of London Telecommunications (COLT). In addition, the U.K. government has also announced its intent to grant AT&T's pending license. Finally, we note that U.S. carriers, such as U S West and NYNEX, are licensed in the United Kingdom as cable operators, and as such are also providing telephony.

9. AT&T's request that we deny all three aspects of BTNA's resale application until BT offers a cost-based accounting rate is overly broad.[11] Pursuant to BTNA's request, we are currently addressing only resale of switched services and private lines for non-interconnected services. As neither of these categories of resale services involves the bypass of the public switched network, we do not share AT&T's concerns about the ability of BT and BTNA together to divert switched traffic from the international settlements process, and thereby eliminate any incentive BT may have to negotiate a lower international accounting rate. As a result, we do not agree that we should condition BTNA's instant authorization upon BT's offering U.S. carriers a cost-based accounting rate.

10. Nonetheless, while BT's accounting rate falls within the benchmark established by the Commission in 1992,[12] we agree with AT&T that much more progress must be made toward cost-based accounting rates. We also note representations made by both BTNA and BT in this proceeding and in the context of the U.K. equivalency proceeding,[13] indicating their expectation of lower, cost-based accounting rates as competition in international private line resale occurs. As a result of the recent determinations of equivalency by the United States and the United Kingdom which allow the introduction of international private line resale competition on the U.S.-U.K. route, we would expect BT to respond by lowering its accounting rate with U.S. carriers.

11. Sprint and AT&T seek clarification of why BTNA continues to seek resale authority in light of MCI's acquisition of BTNA. Sprint and AT&T also request clarification of any affiliation between BT and MCI, BTNA, and the BT/MCI joint venture "Concert", and thus any potential for BT to discriminate in favor of its "affiliates".

12. The terms of the BT and MCI alliance reveal that MCI acquired the previously-held assets, not the name, of BTNA. BTNA continues to pursue its Section 214 application as a wholly-owned subsidiary of BT. Moreover, the Commission's rules apply a control standard for determining whether a carrier is affiliated with another carrier.[14] Given the Commission's previous finding that the terms and conditions of the BT and MCI alliance did not constitute a transfer of control of MCI to BT, MCI is not considered an affiliate of BT under Section 63.01(r) of the Commission's Rules 47 C.F.R. §63.01(r).[15] BTNA, as a wholly-owned subsidiary, is an affiliate of BT. Concert, jointly-controlled by BT and MCI and represented as a

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[9] *See e.g.*, Cable & Wireless Communications, Inc. (CWCI), 8 FCC Rcd 1664 (Com. Car. Bur. 1993).

[10] On September 19, 1994, the Commission determined that the United Kingdom affords U.S.- based carriers resale opportunities equivalent to those available under U.S. law. *See ACC and Alanna Section 214 Authorization to Resell International Private Lines for the provision of Switched Services*, FCC 94-236 (released October 6, 1994).

[11] Specifically, AT&T suggests that we should require BT to offer .15 Special Drawing Rights (SDRs) per minute as an acceptable cost-based accounting rate with U.S. carriers.

[12] *See* In the Matter of Regulation of International Accounting Rates, Phase I, Second Report and Order (*Benchmark Order*), 7 FCC Rcd 8040 (1992), *recon. pending*.

[13] *See* note 10, *supra*.

[14] *See International Services Order*, 7 FCC Rcd 7331 (1992), *errata*, 8 FCC Rcd 452 (1993).

[15] *See MCI Communications Corporation/British Telecommunications plc, Joint Declaratory Ruling and Order* (BT/MCI Order), FCC 94-188 (released July 25, 1994). Therefore, contrary to Sprint's assertion, under the current Commission rules, BTNA's certification that it has no "affiliation" with any U.S. carrier whose facilities-based services it intends to resell is not incorrect as a result of BT's equity investment in MCI.=

provider of enhanced services, is not a U.S.-licensed carrier.[16] In response to Sprint and AT&T, we note that in the United Kingdom BT's license to operate as a service provider prohibits it from engaging in undue discrimination toward any carrier, whether affiliated or not.[17] Furthermore, we note that we imposed significant conditions and reporting requirements on MCI as a result of BT's investment in MCI, recognizing that BT's $4.2 billion investment in MCI did create increased incentives for BT to favor MCI over competing U.S. carriers.[18]

13. SCN opposes BTNA's application, alleging malfeasance on the part of of the U.K. government and anticompetitive conduct on the part of BT and Mercury in the United Kingdom. SCN asserts that the U.K. government deliberately misled SCN as to its ability to participate in international resale in the United Kingdom in 1990-91.[19] As a result, SCN estimates that its investors lost $3 million. SCN requests that we not grant BTNA or any other affiliated entity entry into the U.S. market until it receives repayment of the $3 million from the U.K. duopoly (BT and Mercury), and the U.K. government and there is a "level playing field" for competitors.[20] While the interconnection difficulties that SCN encountered in the United Kingdom are unfortunate, we recently found that current U.K. regulatory and market conditions, including the interconnection regime, permit U.S.-based carriers to engage ininternational resale on a substantially equivalent basis.[21]

14. Graphnet argues that BT has directly, and indirectly through BTNA, discriminated against Graphnet both in the United States and internationally. Specifically, Graphnet argues that we should not grant BTNA's application until there has been an investigation of BT's anticompetitive activities in the United Kingdom, or BT's control of BTNA is restricted. Graphnet also argues that BT could use BTNA to exert anticompetitive power in the U.S. domestic marketplace. We believe that Graphnet's immediate concerns of anticompetitive activity are adequately addressed by the fact that BTNA is subject to dominant carrier regulation, including the condition that it may not accept any special concessions from BT, or any affiliated carrier, that are not made similarly available to competing U.S. carriers.[22]

15. Finally, the public interest will be served by the grant of this application in that it introduces additional competition in the resale of international telecommunications services. Competition fosters lower prices, innovative services and increased responsiveness to consumer needs, all of which in turn should help to stimulate U.S. economic growth. Grant of BTNA's application is also in the public interest since it should encourage liberalization of other telecommunications markets around the world. The success of the United States and the United Kingdom in opening their markets to competition may encourage other countries to emulate these procompetitive policies and make their telecommunications markets more open to foreign investment and increased competition.

16. Accordingly, we find that the present and future public convenience and necessity require the grant of this authorization to BTNA, subject to its regulation as a dominant carrier for the provision of its authorized services.

## IV. ORDERING CLAUSES

17. Upon consideration of the above-captioned application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale by BTNA of switched services and of international private lines for the provision of non-interconnected international private line services to the general public.

18. Accordingly, IT IS ORDERED that application File I-T-C-93-126 IS GRANTED IN PART and DEFERRED IN PART, and BTNA is authorized to resell the tariffed switched services and international private lines of authorized U.S. common carriers.[23]

19. IT IS FURTHER ORDERED that BTNA is authorized to lease, pursuant to tariff, and operate a one-half interest in up to sixty-three (63) E-1 circuits from authorized U.S. common carriers for the provision of non-interconnected private line services between the United States and each of the seven (7) international points[24] specified in Appendix A.

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[16] *See BT/MCI Order* at paras. 40-42, FCC 94-188 (released July 25, 1994).

[17] Conditions 17 and 50 of BT's Public Telecommunications Operator License prohibits undue discrimination toward any carrier or among BT affiliates.

[18] We also note that the Department of Justice shared our concerns about potential discrimination and imposed certain disclosure requirements on both MCI and Concert designed to enhance the ability to monitor for anticompetitive conduct. *See U.S. v. MCI Communications Corp. and BT Forty-Eight Co. (NEWCO)*, Case No.1:94 CV01317 (D.C. filed June 15, 1994).

[19] More specifically, SCN argues that the U.K. government (then a 49% shareholder in BT and controller of the BT/Mercury duopoly) reneged on its deregulatory plans and failed to assist SCN with a claim of anti-competitive pricing of local interconnection by both BT and Mercury. *See* April 14, 1993 Petition to Deny at 1-2. We note that the U.K. government currently holds no more than 1.5% of BT.

[20] *Id.* at 2 and February 21, 1994 Response at 2.

[21] SCN's allegations of past malfeasance and anticompetitive conduct on the part of the U.K. government and BT/Mercury should be referred to the appropriate body in the United Kingdom. Alternatively, SCN should refer its complaint to the Antitrust Division, U.S. Department of Justice.

[22] As with SCN, we find no evidence in the record to suggest that Graphnet has referred its allegation of past misconduct on the part of BT in the United Kingdom to the appropriate authorities in the United Kingdom, which has direct jurisdiction over the activities of BT, which would be the most direct course of action.

[23] BTNA proposes to resell the international private line and switched services pursuant to the appropriate following carriers' tariffs: AT&T FCC Tariff Nos. 1, 2, 4, 9, 11 and 12; C&W FCC Tariff No. 3; MCI International FCC Tariff No. 1; MCI-OTI FCC Tariff No. 3; MCI-WUI FCC Tariff No. 27; Sprint FCC Tariff Nos. 1, 2, 5 and 7; Worldcom FCC Tariff No. 1; TRT-FTCC FCC Tariff No. 14; TRT International FCC Tariff No.1; and FTCC FCC Tariff Nos. 17 and 23.

[24] We note that should BTNA obtain any interest in facilities beyond the authorized seven international points for the purpose of providing common carrier services, including private line services, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for BTNA to file additional applications for a certificate of public convenience and necessity under Section 214 to begin

20. IT IS FURTHER ORDERED that neither BTNA nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which BTNA or any such persons or companies controlling or controlled by BTNA are parties.

21. IT IS FURTHER ORDERED that BTNA shall comply with Section 203 of the Communications Act, 47 U.S.C. §203, Part 61, and Sections 43.51 and 43.61 of the Commission's Rules, 47 C.F.R. Part 61, and §§43.51 and 43.61.

22. IT IS FURTHER ORDERED that BTNA, as a dominant carrier, shall request Section 214 authorization for all circuit additions to any of the herein authorized international points, pursuant to Section 63.01 of the Commission's Rules, 47 C.F.R. §63.01.

23. IT IS FURTHER ORDERED that BTNA, as a dominant carrier, shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and the herein authorized international points within 90 days after the end of each calendar quarter.

24. IT IS FURTHER ORDERED that BTNA shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreement entered into by BTNA or its parent/affiliates that affect traffic between the United States and the United Kingdom within 30 days of their execution.

25. IT IS FURTHER ORDERED that this Order may be subject to future modification as a result of any action the Commission may take in any related proceedings or relevant proceedings of general applicability.

26. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

**Appendix A**

| Country | Circuit |
|---|---|
| Australia | 4 E-1 |
| Canada1 | 6 E-1 |
| France | 4 E-1 |
| Germany | 4 E-1 |
| Netherlands | 4 E-1 |
| Sweden | 2 E-1 |
| United Kingdom | 29 E-1 |

service to each additional country and for authority to acquire any facilities needed to provide service to such additional points. The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).)

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 9, 1994**

**Released: November 9, 1994**

IN REPLY REFER TO:
1800C1-CW
94060464

National Farm Workers Service Center, Inc.
Licensee, Radio Station KNAI(FM)
P.O. Box 62
Keene, CA 93531

Dear Licensee:

As you know, we have been investigating allegations that Station KNAI(FM) has violated Section 399B of the Communications Act of 1934, as amended (the "Act"). This letter details the results of our investigation.

Section 399B of the Act, as implemented by Section 73.503 of the Commission's Rules, prohibits public broadcast stations from broadcasting advertisements. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities. 47 U.S.C. § 399B. Although contributors of funds may receive on-air acknowledgements, the Commission has unequivocally stated that such acknowledgements may be made for identification purposes only and should not promote the contributor's products, services, or company. Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. See *Public Notice*, "In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," 7 FCC Rcd 827 (1986).

By letter of December 29, 1992, the Commission admonished National Farm Workers Service Center, Inc. for violation of Section 399B of the Communications Act. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, to Paul Chavez, President, National Farm Workers Services Center, Inc. (December 29, 1992) (the "1992 Admonition Letter"). As a result of complaints received since that time, the FCC's Douglas, Arizona field office monitored the broadcasts of Station KNAI on July 4, 1993 and February 9, 1994 (relevant transcripts attached hereto), and issued an Official Notice of Violation on February 10, 1994.

On March 10, 1994, you responded to the Notice, claiming that the advertisements at issue are in full compliance with the FCC's Rules and Regulations. We do not believe enforcement action is warranted with respect to any of the July 1993 announcements. However, we find that the February 1994 broadcasts transcribed in the attachment hereto, contain promotional language in violation of the Act and the Commission's Rules.

All three of these announcements contain language regarding the availability of some type of financing or credit ("layaway," "special financing," and "different plans for financing"). You contend that this type of financial language is permissible because it does not contain specific price information. However, the Commission has repeatedly found financial information to be violative of Section 399B, even where the price is not specifically identified. *See, e.g., Memorandum Opinion and Order, Station WMPR(FM)*, 8 FCC Rcd 784 (1993)(use of term "happy hour" considered prohibited price information); *Letter to WYNE-TV*, 7 FCC Rcd 6864 (1992) ("wisdom of thrift" found to constitute prohibited price information). In addition, by letter of April 21, 1992, the FCC admonished Farmworkers Communications, Inc., a corporation affiliated with National Farm Workers Service Center, Inc., for the use of the term layaway. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, to Anthony Chavez, President, Farmworkers Communications, Inc. (April 21, 1992) (the "KUFW Letter").

You also assert that this type of price and descriptive information is not designed to be promotional, but is necessary to "make it clear to [your] listeners that -- regardless of their income level or color of their skin -- they are *welcome* in the establishment and offices of [your] underwriters and donors." However, notwithstanding your objective, we believe this language is clearly promotional and is an inducement for listeners to patronize the businesses of your underwriters. This argument was made by Farmworkers Communications, Inc. and was similarly dismissed by the Commission in the KUFW Letter.

Finally, as a mitigating factor, you indicate that since the previous Commission investigation, the staff has been better trained in the Commission's Rules and policies. Specifically, you state that your "staff is well-trained and highly sensitive to the distinction between permissible and impermissible elements of enhanced donor and underwriting acknowledgements." Also, you indicate that as a result of the current investigation you have reviewed these requirements with your staff again. While we find that the station is still broadcasting impermissible promotional material, our monitoring on July 4, 1993 and February 9, 1994 did show improvement since the Commission's previous investigation.

Based on the evidence before us, we find that you violated Section 399B of the Communications Act and Section 73.503 of the Commission's Rules. You are HEREBY ADMONISHED for such violations and are expected to use care to comply with these requirements in the future. Any additional findings of violation may result in more serious sanctions. This matter will be made part of Station KNAI's complaint file.

Sincerely,

Norman Goldstein, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

**ATTACHMENT**

Station KNAI(FM)
Phoenix, Arizona

February 9, 1994

**11:25 a.m. MST:**

Garcia's Jewelry and Fashions sponsor in part Radio Campesina. Garcia's Jewelry and Fashion offers bracelets, chain bracelets, watches, rings, medals, Mexican earrings, broaches, and jewelry in general. Repairs and cleaning of jewelry and layaway system. Also, clothes for ladies and children, perfumes, fur bags, and Notary Public and income tax services. Located at thirty oh four West McDowell in Phoenix. Telephone 233-2904, 233-2904.

**11:26 a.m. MST:**

Pioneer Ford, the Mexican store, and Agustin Jimenez, your most humble servant, sponsor in part Radio Campesina. Pioneer Ford of Agustin Jimenez, continues to offer the credit card Mastercard from Bank One of Arizona for all the month of February. Pioneer Ford and Agustin Jimenez offers the complete Ford line. From the pick-ups XLC, long and short beds, Aerostars, seven passenger mini-vans, and their small truck, Ranger. Pioneer Ford offers special financing. Pioneer Ford offers an inventory of used cars and trucks, including the large Broncos from Ford. Pioneer Ford of Agustin Jimenez is located on the corners of Freeway at Thomas Rd and Grand Avenue. Pioneer Ford has its second location at 47th Avenue and Camelback. Pioneer Ford and Pioneer West with telephone numbers 257-1933 and 846-4499.

**12:00 p.m. MST:**

Autorama sponsors in part Radio Campesina. . . . Autorama offers a variety of used cars in different styles and colors. Trucks, cars, and vans, with different plans for financing. . . . Autorama is located at 2221 West Van Buren, telephone 257-8909, 257-8909. We speak Spanish.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

BLUE RIDGE CABLE TELEVISION, INC.

Petition for Reconsideration of Certification
of Washington Township, PA (PA2954)
to Regulate Basic Cable Service Rates

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 14, 1994; Released: November 16, 1994**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On November 5, 1993, Blue Ridge Cable Television, Inc. ("Blue Ridge") submitted a timely-filed petition for reconsideration challenging the certification of Washington Township, PA ("Washington") to regulate the system's rates for basic cable service and associated equipment.[1]

2. Section 623(a)(4) of the Communications Act, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the effective date of such certification.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

## II. DISCUSSION

3. In its petition, Blue Ridge alleges that its rates are exempt from regulation because its system "has fewer than 30 percent of the households in the franchise area that subscribe to the cable service of its cable system."[7] Blue Ridge presents no specific facts or documentation to support this conclusory allegation.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[8] The cable operator bears the burden of rebuttinghthe presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[9] Based on the evidence, we find that Blue Ridge has not met this burden. Specifically, Blue Ridge does not indicate the number of households within its franchise area or the number of households which subscribe to its cable service. In addition, it does not provide any documentation to support its claim. Accordingly, it has failed to demonstrate that effective competition exists and, therefore, we deny its petition.

## III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Blue Ridge Cable Television, Inc. challenging the certification of Washington Township, PA to regulate Blue Ridge's basic cable rates IS DENIED.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that Blue Ridge Cable Television, Inc. SHALL FILE the required rate justifications on the appropriate forms with Washington Township, PA within 30 days of the release date of this *Memorandum Opinion and Order* or within 30 days of receipt of notice from Washington Township, PA that it is regulating rates, whichever is later.

8. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] Washington filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition ("FCC Form 328") on October 14, 1993. Its certification became effective on November 13, 1993.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[8] 47 C.F.R. § 76.906.

[9] 47 C.F.R. § 76.911(b)(1).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PP Docket No. 93-253**

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

**FOURTH MEMORANDUM OPINION AND ORDER**

**Adopted: October 19, 1994; Released: October 19, 1994**

By the Commission:

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## I. INTRODUCTION

1. By this action, we resolve petitions for reconsideration or clarification of our rules governing the methodology and procedure for auctions to provide personal communications services in the 2 GHz band (called "broadband PCS").[10] Twenty-six petitions were received, as well as 17 oppositions and 8 replies.[11] Specifically, we will re-examine aspects of our rules concerning: simultaneous multiple round auction design and procedures; application, payment and penalty procedures; and regulatory safeguards. In a future *Order*, we will consider whether the public interest would be served by changing our entrepreneurs' block rules, as well as other provisions we established to ensure that small businesses, rural telephone companies and businesses owned by minorities and women (collectively termed "designated entities") have a meaningful opportunity to participate in the provision of broadband PCS.

2. In general, the rules and decisions we make in this *Fourth Memorandum Opinion and Order* are designed to result in auctions that will award licenses to those who value them most highly. To achieve this goal, we adopt auction rules that balance the need to allow bidders the information necessary to express the interdependency of licenses with the need to minimize complexity. We believe the rules we adopt strike a proper balance between these objectives.

## II. BACKGROUND

3. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added Section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. § 309(j).[12] This section gives the Commission express authority to employ competitive bidding procedures to select among mutually exclusive applications for certain initial licenses. In the *Second Report and Order* in this proceeding, the Commission exercised its authority by determining that broadband PCS licenses should be awarded through competitive bidding and prescribing general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services.[13] We re-examined certain aspects of these general rules and procedures in the *Second Memorandum Opinion and Order*, released August 15, 1994.[14]

4. In the *Fifth Report and Order*, we established specific competitive bidding rules for broadband PCS.[15] As described more fully below, these rules, in part, set forth auction methodology, procedure, payment and safeguard provisions. We decided in the *Fifth Report and Order* to conduct three separate auctions for broadband PCS licenses: the first for the 99 available broadband PCS licenses

[10] *Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178 (Rel. July 15, 1994) (*Fifth Report and Order*).

[11] A list of the petitions, oppositions and replies is contained in Appendix A.

[12] *See* Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. § 309(j)(3)(B).

[13] *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Second Report and Order*).

[14] *Second Memorandum Opinion and Order* in PP Docket No. 93-253, FCC 94-215 (Rel. Aug. 15, 1994) (*Second Memorandum Opinion and Order*).

[15] The *Third Report and Order* and *Fourth Report and Order* in this docket established competitive bidding rules for narrowband PCS and Interactive Video and Data Service, respectively. *See Third Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2941, *recon. Third Memorandum Opinion and Order*, FCC 94-219 (Rel. Aug. 17, 1994); *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

in MTA blocks A and B; the second for the 986 broadband PCS licenses in BTA blocks C and F (the "entrepreneurs' blocks"); and the third for the remaining 986 broadband PCS licenses in BTA blocks D and E.[16] We also decided to conduct each auction through simultaneous multiple round bidding with simultaneous stopping rules. Under that approach, bidding will remain open on all licenses until the bidding closes on all licenses in the auction. We further established a variety of rules governing bid increments and bidding activity to move the auctions toward completion in a reasonable period of time. We also retained the ability to use other approaches, including sequential auctions for the licenses, and to make other adjustments to the auction process as necessary. Finally, we established pre- and post-auction application procedures; payment and default penalties; and other safeguards to prevent collusionamong applicants.[17]

## III. DISCUSSION

### A. Auction Design and Procedures

#### 1. Standby Bidding Queues

5. In the *Fifth Report and Order*, the Commission determined that the simultaneous multiple round auction design would be the preferred methodology for broadband PCS auctions, primarily because there is significant interdependency among the licenses to be auctioned, and the simultaneous multiple round auction design facilitates more efficient aggregation and imparts to bidders greater amounts of information regarding license values than the other auction designs.[18] We reserved the authority, however, to use combinatorial bidding techniques in conjunction with simultaneous multiple round auctions to further facilitate the efficient aggregation of licenses. On reconsideration of the general auction rules adopted in this proceeding, the Commission also noted that we would consider the use of a standby queue mechanism if we elected to use combinatorial bidding techniques.[19] The standby queue would allow parties seeking individual licenses to coordinate their bids in order to beat a prevailing bid for a combination of licenses.[20]

6. *Petition.* GTE requests that the Commission adopt a standby queue bidding mechanism for the BTA spectrum allocations.[21] GTE maintains that adoption of the standby queue proposal would facilitate the aggregation of 10 MHz blocks into larger spectrum blocks by allowing bidders to obtain full information about the status of bidding on the individual blocks.[22] GTE further notes that a standby queue would enable bidders to design individualized service areas consistent with their business plans and financial capabilities.[23]

7. *Decision.* The standby queue is a mechanism that is useful only in the context of combinatorial bidding, and is inapplicable to simultaneous multiple round bidding without combinatorial bidding. In the *Fifth Report and Order*, we concluded that the disadvantages of combinatorial bidding were likely to outweigh the advantages for auctions of broadband PCS licenses, and we adopted simultaneous multiple round bidding as our auction methodology for broadband PCS licenses. Nevertheless, we left open the option to allow combinatorial bidding if simultaneous multiple round auctions without combinatorial bidding do not result in efficient aggregation of licenses, and if there are significant advances in the development of combinatorial auctions.[24] As we noted in the *Second Memorandum Opinion and Order*, we have no current plans to use combinatorial bidding.[25] If, however, we do adopt such an auction methodology in the future, we will consider the use of a standby queue mechanism at the same time.

#### 2. Activity Rules

8. In the *Fifth Report and Order*, the Commission adopted an activity rule to ensure that the auctions will close within a reasonable period of time and to increase the information conveyed by bid prices during each auction.[26] The activity rule requires bidders to maintain certain minimum levels of bidding activity during each round of the auction to preserve their maximum bidding eligibility.[27] The rule provides for three stages with increasing levels of

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[16] When we crafted our broadband PCS licensing rules in Gen. Docket 90-314, we divided the licensed broadband PCS spectrum into three 30 MHz blocks (A, B, and C) and three 10 MHz blocks (D, E, and F). We also designated two different service areas: 493 Basic Trading Areas (BTAs) and 51 Major Trading Areas (MTAs). The 493 BTAs and 51 MTAs used in our broadband PCS licensing rules have been adapted from the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, at 38-39. *See Second Report and Order* in Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993), *recon. Memorandum Opinion and Order*, FCC 94-144 (Rel. June 13, 1994).

[17] As indicated *supra*, rules were also adopted to provide for opportunities for designated entities to participate in the broadband PCS service. *See Fifth Report and Order*, FCC 94-178 at ¶ ¶ 93-217.

[18] *Id.* at ¶ 31-32.

[19] *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 44.

[20] *Id.* The National Telecommunications and Information Administration, the sponsor of an experiment to test the standby queue mechanism, described it as follows:

> The "stand-by queue" feature of [Adaptive User Selective Mechanism software] allows parties seeking individual licenses to coordinate their bids in order to beat the currently prevailing bid for a combination of licenses. The stand-by queue displays the amount that other bidders are willing to pay for the licenses that are part of a combination bid. A bidder can determine from the sum of these amounts how much to raise his or her own bid in order to surpass the current winning bid.

*See* Letter to FCC Chairman Reed Hundt from Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, *ex parte* filing in PP Docket No. 93-253 (filed Feb. 28, 1994).

[21] GTE Petition for Partial Reconsideration (GTE Petition), filed Aug. 22, 1994, at 19.

[22] *Id.* at 21.

[23] *Id.*

[24] *Fifth Report and Order*, FCC 94-178 at ¶ 35.

[25] *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 44.

[26] *Fifth Report and Order*, FCC 94-178 at ¶ 51.

[27] *Id.* at ¶ ¶ 52-53.

activity required in each stage. The auction moves from stage I to stage II when, in each of three consecutive rounds of bidding, the high bid has increased on less than 10 percent of the spectrum (measured in terms of MHz-pops)[28] being auctioned. The auction will move from stage II to stage III when, in each of three consecutive rounds in stage II, the high bid has increased on less than 5 percent of the spectrum (measured in terms of MHz-pops).[29] We concluded that in simultaneous auctions without these requirements, bidders may be inclined to hold back, causing the auction to progress exceedingly slowly or possibly causing the auction to close prematurely. Furthermore, bidders would not know whether a low level of bidding on a license means that the license price is near its final level or, instead, if many serious bidders are holding back and may bid up the price later in the auction.

9. *Petition.* GTE maintains that the Commission's activity rule will unnecessarily complicate the PCS auctions and limit the ability of bidders to revise their plans throughout the course of the auction.[30] GTE finds the rules regarding movement from one stage to the next, with the associated minimum required increase in activity levels, particularly troubling. Under these rules, GTE maintains, a bidder may be forced to submit a relatively high bid on properties with little stand-alone value at an early stage of the auction in order to ensure that the bidder can continue to participate in subsequent stages of the bidding with respect to all markets in which it is interested. GTE further notes that the present rules restrict a bidder's ability to alter bidding plans if information revealed during the latter stages of the auction causes the bidder to become interested in additional properties. Rather, GTE alleges that the rule encourages artificial bidding activity that is inconsistent with thebidder's true intent.[31] GTE argues that instead bidders should only be required to be active on a single license in each round.[32] GTE maintains that this approach would afford maximum flexibility for qualified entities to adapt their bidding strategies to the activities of the other applicants.[33]

10. *Decision.* The issues raised by GTE concerning the three-stage activity rule, and the alternative activity rule proposed by GTE, were considered in the reconsideration of the *Second Report and Order*.[34] We concluded at that time that no changes in our existing procedures were needed. We see no reason to revise that conclusion.

11. As we discussed in the *Second Memorandum Opinion and Order*, we do not believe, despite GTE's assertion, that the three-stage activity rule that we chose as our preferred activity rule will excessively restrict bidders' flexibility to bid for desired combinations of licenses, or cause licenses to be awarded to bidders who value them less than other bidders.[35] The rules were expressly designed to counteract the incentive to delay serious bidding that may occur in simultaneous auctions, without unduly limiting bidders' flexibility to pursue backup strategies and to use new information.[36] The requirement in the first stage that bidders remain active on one-third of the MHz-pops for which they wish to remain eligible constitutes only a minor restriction. By the time the auction enters stage III (if it ever does), bidding strategies should be well-advanced. In fact, we did not exercise our discretion to move the nationwide narrowband auction beyond stage I, so more restrictive rules were not invoked. Nevertheless, the Commission cannot expect all auctions to move as quickly as the nationwide narrowband auction, especially when there are more licenses with greater interdependencies among licenses. Thus, it would not be prudent for the Commission to preclude the use of stages II and III.

12. We note that, in the *Second Report and Order*, we retained the flexibility to decide on an auction-by-auction basis, and to announce by Public Notice before each auction, whether to use an activity rule, and if so, what type of rule.[37] We retained this flexibility for broadband PCS in the *Fifth Report and Order*.[38] Thus, if experience shows that the three-stage rule we adopted is unduly difficult to administer or excessively restricts bidders' flexibility, we will have the option to shift to some other activity rule, including the one recommended by GTE requiring only that bidders be active on a single license in each round.

13. We wish to make some minor adjustments in the activity rules on our own motion. First, we conclude, after our experience in conducting the nationwide narrowband auction, that we may find it important to move the auctions from one stage to the next at a different pace than would occur under the current activity rule. Accordingly, we retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity (*e.g.*, the percentage of licenses on which there are new bids, the number of new bids, and the percentage increase in revenue). Bidders will be notified of our intention to move to another stage at least one round prior to the commencement of the next stage of an auction.

14. We also stated in the *Fifth Report and Order* that in stage III, a bidder would have to be active on 100 percent

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[28] "Pop" refers to each member of the population of the licensed service area and "MHz" refers to the amount of spectrum, in megahertz, that the licensee is permitted to use. The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. *See id.* at ¶ ¶ 52-54.

[29] For example, if two nationwide 30 MHz blocks of spectrum are put up for bid and the national population is approximately 250 million, a total of approximately 15,000 million MHz-pops would be available in the auction. If in stage I of the auction, the high bid increases on licenses encompassing less than 1,500 million MHz-pops for three consecutive rounds, the auction moves to stage II. This would be the case, for example, if in three consecutive rounds new bids were received on only a license for the New York MTA (26 million pops) and a license for the Los Angeles MTA (19 million pops), since the two licenses encompass a total of 1,350 million MHz-pops. Once in stage II, if in each of three consecutive rounds new acceptable bids are received on licenses encompassing less than 750 million MHz-pops, the auction would move to stage III.

[30] GTE Petition at 14.

[31] *Id.* at 16-17.

[32] *Id.*

[33] *Id.* at 18.

[34] *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ ¶ 14-17.

[35] *Id.* at ¶ 15.

[36] *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 142.

[37] *Id.* at ¶ 133.

[38] *Fifth Report and Order*, FCC 94-178 at ¶ 57.

of the MHz-pops for which it wishes to retain eligibility.[39] In order to allow bidders greater flexibility, we think that it may be beneficial in auctions where we expect high bidding to reduce this figure slightly, but in no case below 95 percent. We will announce the required activity levels for stage III by Public Notice in advance of each auction.

15. Finally, in the *Fifth Report and Order* we permitted bidders one waiver from the activity rule during each stage of an auction. A waiver will retain a bidder's eligibility from a previous round even though its bidding activity falls below the required level. We stated that if an activity rule waiver is entered in a round in which no other bidding activity occurs, the auction will remain open, but we stated that we might announce that submission of a waiver would not keep an auction open under any circumstances.[40] We also stated that a waiver may be submitted either in the round in which bidding falls below the level required to maintain current eligibility, or prior to submitting a bid in the next round. We now wish to clarify that the Commission retains the discretion to modify the method and timing of submitting waivers and to allow for two types of "waivers -- "proactive" waivers and "automatic" waivers. Both types of waivers will retain a bidder's eligibility from the previous round even though its bidding activity in the current round falls below the required level. However, a proactive waiver invoked in a round in which there are no new valid bids will keep an auction open, while an automatic waiver submitted in a round in which no other bidding activity occurs will not keep an auction open. Proactive waivers must be requested by the bidder, but automatic waivers will be submitted automatically for a bidder whenever a bidder's eligibility would be reduced because of insufficient bidding activity and a waiver is available. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level. We also wish to retain the discretion to change the number of waivers that will be permitted and the frequency with which they may be exercised by Public Notice prior to each auction. As Professor Milgrom, a leading game and auction theorist, notes, a change in the rule for moving from one stage to another may result in many more rounds being completed in one stage, and may make a rule allowing one waiver per stage inappropriate.[41] Airtouch also recommends allowing bidders more flexibility in choosing when to use waivers.[42]

### 3. Stopping Rule

16. In the *Fifth Report and Order*, we adopted a simultaneous stopping rule for all licenses in an auction. We determined that this approach, which holds bidding open on all licenses until no new acceptable bid is offered on any license, would provide bidders full flexibility to modify their bidding strategy as more information became available.[43] We further concluded that our activity rule (discussed *supra)* would help establish a reasonable pace and minimize the risk that bidders would hold back their bidding until the final rounds.[44] Because of the large number of BTA licenses, however, we retained the discretion to use a hybrid stopping rule or to allow bidding to close individually for BTA licenses if we determine our present rule is too complex.[45] In addition, we retained discretion to declare at any point after 40 rounds in a simultaneous multiple round auction that the auction will end after some specified number (probably three) of additional rounds.[46] We decided, however, that if the Commission exercises this authority we would accept bids in the final round(s) only for licenses on which the highest bid had increased in at least one of the preceding three rounds.[47]

17. *Petitions.* Metrex Communications Group (Metrex) and GTE both comment on the Commission's stopping rules. Metrex encourages the Commission to adopt an individual stopping rule for all BTA licenses. Specifically, Metrex requests that the Commission employ a market-by-market stopping rule pursuant to which bidding would close on each BTA if no acceptable bids are received after five rounds of bidding.[48] A market-by-market stopping rule, Metrex argues, would provide entrepreneurs' block bidders the necessary certainty to develop and implement regional licensing strategies.[49] GTE requests that the Commission decline to exercise its discretion to announce, after forty rounds, that the auction will close after an additional three rounds.[50] GTE maintains that such action would effectively reduce the auction to the equivalent of a first price sealed bid auction.[51] Instead, GTE supports the Commission's determination that the auction should terminate for all markets once a single round passes in which no acceptable bids are submitted for any license.[52]

18. *Decision.* We reaffirm that, as we stated in the *Fifth Report and Order,* we will in most cases use a simultaneous 8stopping rule for simultaneous auctions.[53] We continue to believe that a simultaneous stopping rule has important efficiency advantages in allowing bidders to pursue backup ,strategies and to take advantage of new information from earlier bids. Further, we do not believe that a simultaneous stopping rule will prevent the implementation of regional strategies. We believe bidding activity in early rounds will provide significant information about the value of licenses to competing bidders. If bidding takes unexpected turns, it is precisely the fact that bidding on all licenses remains open to the end that will give bidders the flexibility to adopt a new strategy if an original one proves less desirable than anticipated. Moreover, bidders have the option of

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[39] Id. at ¶ 53.
[40] *Id.* at ¶ 56, n.37.
[41] Affidavit of Paul R. Milgrom, September 8, 1994 at 9. Professor Milgrom is the Shirley and Leonard Ely, Jr. Professor of Humanities and Sciences and Professor of Economics of Stanford University and an architect of the activity rule adopted in our *Fifth Report and Order.*
[42] *Ex parte* submission of Airtouch Communications, Inc. (Airtouch), Sept. 29, 1994.
[43] *Fifth Report and Order,* FCC 94-178 at ¶ ¶ 46-47.
[44] *Id.*
[45] *Id.* at ¶ 47.
[46] *Id.* at ¶ 48.
[47] *Id.* at ¶ 49.
[48] Metrex Petition for Reconsideration (Metrex Petition), filed Aug. 22, 1994, at 3.
[49] *Id.* at 3-4.
[50] GTE Petition at 18.
[51] *Id.* at 19.
[52] *Id.*
[53] *Fifth Report and Order,* FCC 94-178 at ¶ 47.

withdrawing high bids during an auction, subject to the applicable penalties, if they find they have bid too high on one license in the expectation of getting a complementary license at a low price.

19. Our experience in the nationwide narrowband auctions bears out this conclusion. Individual licenses often had no new bids for several rounds, followed by active bidding and steep increases in bids.[54] Allowing bidding to close on licenses individually, while bidding remains active on others, creates a risk of closing on some licenses before the final value has been reached, decreasing the likelihood that the license will be awarded to the bidder that values it most and reducing the revenues generated. In addition, as Professor Milgrom points out, individual closing might encourage strategic bidding that would reduce the efficiency of the auction.[55] Hence, we decline to adopt Metrex's recommendation that the Commission adopt and immediately announce an individual stopping rule. We note, however, that in the *Fifth Report and Order* we retained the discretion to use a hybrid or individual stopping rule for BTA licenses if a simultaneous stopping rule proved too complex to administer for large numbers of licenses.[56] We will announce the specific stopping rule to be used for BTA licenses by Public Notice prior to each auction.

20. As for the option of declaring that the auction will end after some specified number of additional rounds, we agree with GTE that this procedure would likely result in less efficient allocation of licenses, and lower revenues, than allowing the auction to remain open as long as new bids are received.[57] We note that we have other methods to hasten the end of an auction, including shortening the bidding rounds, raising the minimum bid increments, and proceeding to a later auction stage. We wish to retain the option of declaring the imminent end of the auction, however, as a fallback in case of extremely dilatory bidding. We note that the procedure is only a permitted option, and we do not expect to use it except in the unlikely case that other methods fail to bring about the close of an excessively long auction.[58]

#### 4. Duration of Bidding Rounds

21. In the *Fifth Report and Order*, the Commission decided that bidders would be provided a single business day to submit bids and that one round of bidding would be conducted each business day.[59] However, we retained discretion to vary, by Public Notice or announcement, the duration of bidding rounds or the interval at which bids are accepted, in order to move the auction toward closure more quickly.[60]

22. *Petition.* McCaw requests that the Commission lengthen its bidding rounds to ensure that bidders have sufficient time to submit well-informed bids.[61] Noting that bidding decisions are likely to require frequent consultation with lenders, corporate board members, technical staff and any joint venture partners, McCaw alleges that one business day per round is likely to be too short to afford fully-informed bidding.[62] Additionally, McCaw maintains that it will take considerable time for bidders to input auction data, analyze it, and formulate their next bid, unless the Commission electronically makes bidding information available.[63]

23. *Decision.* In the *Fifth Report and Order*, we discussed our discretion to vary the duration of bidding rounds or the interval at which bids are accepted as a tool for moving auctions toward closure more quickly.[64] We anticipated that holding one round of bidding per day might allow bidders more time than necessary to formulate their bids and might result in excessively long auctions. We still believe that our planned one-day bidding rounds are more likely to be too long than too short. We find it likely that McCaw overestimates the time required between rounds to formulate bids, particularly since much of the work of estimating the values of licenses, developing business plans, and arranging financing can be done in advance of the auction. Further, as Professor Milgrom points out, under McCaw's proposal the broadband auction might last as much as two years.[65]

24. We wish to clarify that we retain the discretion to lengthen as well as shorten the duration of bidding rounds or the interval at which bids are accepted, and will lengthen the time allowed for bidding if we see evidence during the auctions that bidders are prevented by the bidding schedule from developing rational, well-informed bids. Nevertheless, it is more likely that we will shorten bidding rounds than that we will lengthen them because we believe that doing so will expedite provision of PCS service to the public without reducing the efficiency of the auction. We believe it is extremely unlikely that we will hold more than two rounds per day, though we may start with one round per day and move to two rounds per day after the first week if it appears that this schedule will allow bidders enough time to formulate their bids.

25. We agree with Pacific Bell that prospective bidders may find it important to know the time parameters of bidding rounds as early as possible. We do not believe we have enough information at present to set an appropriate minimum duration for bidding rounds. We will continue to consider this issue as the broadband PCS auctions approach in light of the experience we gain in the regional narrowband auctions.

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54 *See* Affidavit of Paul R. Milgrom, Sept. 8, 1994 at 2.

55 *Id.*

56 *Fifth Report and Order*, FCC 94-178 at ¶ 47.

57 GTE Petition at 18-19.

58 *Fifth Report and Order*, FCC 94-178 at ¶ 48. We stated that if we used this closing procedure we would accept bids in the final round(s) only for licenses on which the highest bid increased in at least one of the preceding three rounds. Thus, the procedure would incorporate a form of individual closing. It would encourage active bidding on all desired licenses in the later stages of an auction to prevent losing licenses through unexpected closings, and would ensure high bidders that they would not lose a license without having an opportunity to make a counter-offer. *Id.* at ¶ 49. This procedure would impose the certainty Metrex seeks for the final bids of an auction, but would not allow the development of extended regional bidding strategies because it would occur only at the end of the auction.

59 *Id.* at ¶ 50.

60 *Id.*

61 McCaw Petition for Reconsideration (McCaw Petition), filed Aug. 22, 1994, at 3; Reply of McCaw Cellular Communications, Inc. (McCaw Reply), filed Sept. 19, 1994, at 6-7.

62 McCaw Petition at 3-4.

63 *Id.* at 4.

64 *Fifth Report and Order*, 94-178 at ¶ 50.

65 Affidavit of Paul R. Milgrom, Sept. 8, 1994 at 5.

**5. Timing for Auctioning Specific Spectrum Blocks**

26. In the *Fifth Report and Order*, the Commission decided to auction the broadband PCS spectrum at three separate auctions. The 99 available PCS licenses in MTA blocks A and B will be auctioned first, followed by the 986 PCS licenses in BTA blocks C and F (the entrepreneurs' blocks). In the last auction, the remaining 986 licenses in BTA blocks D and E will be put up for bid.[66] The Commission reasoned that this grouping strikes a proper balance among the competing concerns of awarding licenses to the parties who value them most highly, keeping the auction process simple and manageable, minimizing administrative delay, and fostering designated entity participation.[67]

27. *Petitions*. Columbia PCS, Inc. (Columbia), National Paging and Personal Communications Association (NPPCA), Pacific Bell Mobile Services (Pacific Bell), Small Business PCS Association (SBPCS), and USIMTA petitioned on this issue.[68] Several parties advocate that the entrepreneurs' block licenses (on blocks C and F) be auctioned before, or at approximately the same time as, the MTA block licenses.[69] These petitioners allege that this approach is needed to ensure that the block A and B licensees do not gain a competitive advantage through a head start to the market. NPPCA also argues that BTA licenses in the entrepreneurs' blocks should be auctioned first, to encourage large, non-designated entities to invest in, or partner with, designated entities earlier in the process. NPPCA further argues that the large companies that could help to finance designated entities are holding back until the A and B block auctions occur. USIMTA requests that BTAs be licensed before the MTAs, noting that the Commission's present scheme underestimates the advantage that large companies will have in bidding for non-reserved BTAs after the MTAs. USIMTA argues that auctioning the BTA licenses first will give designated entities a realistic opportunity to acquire licenses before their value is artificially increased by the demand of MTA licenses.[70] In addition, Pacific Bell requests that the Commission auction the BTA licenses that correspond to the territory for which pioneer preferences were awarded simultaneously with the remaining MTA licenses in those areas.[71] BET Holdings, Inc. (BET) in its comments requests that>the Commission affirm the sequence of the PCS auctions, arguing that any market advantage afforded successful A and B block bidders from entering the market before the designated entities will be more than offset by the availability of price information and the accessibility of capital made available to designated entities by frustrated early bidders.[72]

28. *Decision*. In the *Fifth Report and Order*, we decided not to auction all broadband PCS licenses at the same time because of the cost and complexity of auctioning a very large number of interdependent licenses simultaneously.[73] We attempted to divide the licenses into three groups by combining those licenses that are most closely related to minimize interdependence across groups.[74] We stated that auctioning licenses in the entrepreneurs' blocks after those in the 30 MHz unrestricted blocks would assist designated entities in attracting partners among unsuccessful bidders for the 30 MHz unrestricted licenses, and that the auction of the large unrestricted blocks would produce price information that would be valuable to designated entities in their business planning.[75]

29. We continue to believe that the sequence of auctions of broadband licenses specified in the *Fifth Report and Order* will be efficient and will be most beneficial to designated entities, and consequently we decline to make changes in that sequence. We do not believe the alternative sequences proposed by commenters would improve the efficiency or fairness of the auction market.

30. With respect to arguments that we should auction BTA licenses (or at least entrepreneurs' block licenses) before MTA licenses to prevent large firms from getting a head start over designated entities, we believe that such a strategy would be less advantageous to designated entities than the current auction sequence and might reduce the efficiency of the auctions. Because the large firms that are potential partners for designated entities probably would prefer to own outright any licenses they might obtain in an auction, we think it less likely, rather than more likely, that these large firms would form partnership agreements with designated entities if auctions in the restricted blocks were held before the MTA auctions. In addition, we believe that the information about license values conveyed in the MTA auctions will reduce the risk of BTA financing and partnering and so will be valuable to bidders in the entrepreneurs' block auctions. In addition, it appears to usthat a rational strategy for bidders in many cases might be to bid on the largest licenses first and only after the outcome of those auctions is known to attempt to acquire smaller, complementary licenses or, if unsuccessful in the auction for larger licenses, to attempt to aggregate smaller licenses as a backup strategy. In addition, if winners of MTA licenses were willing to bid more than other applicants for complementary BTA licenses, that willingness, we believe, would almost certainly represent true efficiencies of joint operation and ought to be allowed to affect the assignment of licenses.

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[66] *Fifth Report and Order*, FCC 94-178 at ¶ 37.

[67] *Id.* at ¶ ¶ 37-40.

[68] Columbia Petition for Reconsideration (Columbia Petition), filed Aug. 22, 1994, at 8-9; NPPCA Petition for Reconsideration (NPPCA Petition), filed Aug. 22, 1994, at 8; Pacific Bell Petition for Reconsideration and Clarification (Pacific Bell Petition), filed Aug. 22, 1994, at 1-3; SBPCS Petition for Reconsideration (SBPCS Petition), filed Aug. 22, 1994, at 4; USIMTA Petition for Reconsideration (USIMTA Petition), filed Aug. 22, 1994, at 4; NPPCA Reply and Comments to Oppositions to Petitions for Reconsideration (NPPCA Reply), filed Sept. 19, 1994, at 4-5.

[69] NPPCA Petition at 8; SBPCS Petition at 4; Columbia Petition at 8-9.

[70] USIMTA Petition at 4.

[71] Pacific Bell Petition at 1; Reply of Pacific Bell Mobile Services to Comments/Oppositions to Petitions for Reconsideration of the Fifth Report and Order (Pacific Bell Reply), filed Sept. 22, 1994, at 7-8.

[72] BET Comments on Petitions for Reconsideration and Clarification (BET Comments), filed Sept. 9, 1994, at 18-19.

[73] *Fifth Report and Order*, FCC 94-178 at ¶ 36.

[74] *Id.*

[75] *Id.* at ¶ 39.

31. As for auctioning MTA and BTA licenses together in markets with Pioneer's Preference licenses, we continue to believe, as we stated in the *Fifth Report and Order*, that substituting two 10 MHz BTA licenses for a 30 MHz MTA license is not likely to be a widely used strategy, so that little loss of efficiency would result from auctioning MTA and BTA licenses separately.[76] Further, we believe that bidders will have enough information to make informed bids in all MTA markets. We see no reason to believe that auctioning MTA and BTA licenses separately would have a greater effect on efficiency in markets where Pioneer's Preference licenses have been removed from the auction than in other markets, since the same total amount of spectrum is available for PCS in all markets. Commenters apparently have no objection to the plan to separate MTA and BTA auctions in other markets. In addition, auctioning MTA and BTA licenses together in Pioneer's Preference markets would remove those BTAs from the BTA auctions and thus may impede efficient geographic aggregation of licenses. As Omnipoint points out, the plan would also make it more difficult for entrepreneurs' block winners in those markets to aggregate their licenses with other BTA licenses.[77] The auctions might also become unnecessarily administratively complex and confusing to bidders if BTAs were auctioned with MTAs in a few but not all markets. Further, changing the grouping of licenses at this stage in the planning process might cause the first auctions to be delayed.[78] Consequently we are not convinced that any efficiency advantages would accrue from this strategy, and we will continue to auction MTAs separately from BTAs in all markets.[79]

32. We agree with commenters, however, that auctioning the MTA blocks far ahead of other blocks would give a head start to the winners in the MTA blocks that would likely afford them some competitive advantage over winners in later auctions. Consequently, we intend to hold the three broadband auctions as close together in time as possible given our administrative resources. We decline to delay finalizing the award of A and B block licenses, however, because of the overriding public interest in rapid introduction of service to the public.

### B. Application, Payment and Penalty Procedures

#### 1. Authority to Adopt Filing and Processing Rules

33. In the *Notice of Proposed Rule Making (Notice)* in this proceeding, the Commission stated:

> In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45, 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that Sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-90.159, could be used to process those applications with appropriate modifications.[80]

34. *Petition.* The Association of Independent Designated Entities (AIDE) alleges that the Commission acted improperly in adopting substantive PCS application-processing rules because, it argues, such rules are outside the scope of this proceeding, which is limited to implementation of the competitive bidding requirements of § 309(j) of the Communications Act.[81] AIDE argues that the Commission's proposal is legally insufficient to constitute a valid notice of the proposed rules, and that some of the rules cited have no immediate applicability to PCS service.[82] AIDE concludes that the Commission must initiate a supplemental *Notice of Proposed Rule Making* in order to adopt any substantive application-processing rules for PCS.[83]

35. *Decision.* We disagree with AIDE and will not issue a supplemental Notice as it requests. Indeed, we have addressed AIDE's argument previously in the *Fifth Report and Order*.[84] AIDE also raised a similar notice argument concerning the adoption of PCS processing rules on reconsideration of our *Second Report and Order* on auctions.[85] Our response, once again, is that our *Notice* sought comment on specific rule sections contained in Parts 22 and 90 of our Rules, and asked commenters to indicate what modifications should be made to those rules to adapt them for PCS services.[86] In addition, the *Notice* specifically requested comment on the general procedural, processing and petition-to-deny procedures that should be used for auctionable services.[87] The *Notice* 's proposal to adopt processing rules based on Parts 22 and 90 of the Commission's Rules, with any appropriate modifications for PCS services, clearly indicated to commenters the terms of the proposed rules, as is required by the Administrative Procedures Act and the Commission's Rules (*see* 5 U.S.C. § 553 and 47 C.F.R. § 1.413(c)). Thus, we believe our original description of the proposed rule was sufficiently specific to alert interested parties to the substance of our proposal and to provide an adequate opportunity for comment on those proposals. Several commenters did, in fact, address the proposed application and processing rules set forth in our *Notice*, a further indication that sufficient notice was provided.[88] We also believe that these issues

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[76] *See id.* at ¶ 40.

[77] Omnipoint Opposition at 14.

[78] The petitioner does not advocate changing to the proposed grouping if doing so would delay the auction. Pacific Bell Petition at 3.

[79] Pacific Bell suggests as an alternative that the Commission combine all BTA licenses in a single auction. *Id.* Leaving aside the increased size of the resulting auction and the complexities of auctioning restricted and unrestricted blocks together, we fail to see how this proposal addresses the issue of lack of substitutes for the Block B MTA licenses in Pioneer's Preference markets.

[80] *Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) at ¶ 128 (*Notice*).

[81] AIDE Petition for Reconsideration (AIDE Petition), filed Aug. 22, 1994, at 19-24.

[82] *Id.* at 19-20.

[83] *Id.* at 22.

[84] *Fifth Report and Order*, FCC 94-178 at ¶ 82.

[85] *See Second Memorandum Opinion and Order*, FCC 94-215 at ¶ ¶ 58-60.

[86] *Notice*, 8 FCC Rcd 7635 at ¶ 128.

[87] *Id.* at ¶ ¶ 95-114.

[88] *See* Arch Communications Group, Inc. Comments, filed Nov. 10, 1993, at 8-9, 18-19 (application requirements, petitions to deny); AT&T Comments, filed Nov. 10, 1993, at 29-35, 38, 40-42 (application standard, petitions to deny); Cellular Telecommunications Industry Association Comments, filed Nov. 10, 1993, at 4-5, 25-29 (application requirements, petitions to deny); Comcast Corp. Comments, filed Nov. 10, 1993, at 16 (application requirements); Cox Enterprises, Inc. Comments, filed Nov. 10,

were within thescope of this proceeding because as a means of assigning licenses, the competitive bidding process is integrally related to rules and procedures for processing of license applications.

36. The broadband PCS rules established in the *Fifth Report and Order*, and modified here today, adopt several of the procedures set forth in Parts 22 and 90 of the Commission's Rules and discussed in the *Notice*. Our minor modifications to the proposed rules were needed to reflect specific concerns related to auctioning broadband PCS licenses, and address comments raised by the public. The adopted rules are a logical outgrowth of the rules proposed in the *Notice*, applied in the context of the use of competitive bidding to assign broadband PCS licenses. Rules adopted as a logical outgrowth comply with all Administrative Procedure Act requirements.[89]

**2. Disclosure of Bidding Information**

37. In the *Second Memorandum Opinion and Order* in this proceeding, the Commission announced that it would generally release the identities of bidders before each auction.[90] The Commission concluded that disclosure was appropriate because of the advantages of providing more information to bidders and the difficulties involved in ensuring that bidder identities remain confidential.[91] The Commission reserved the option, however, to withhold bidder identities on an auction-by-auction basis.[92] Bidders will be informed by Public Notice prior to each auction whether the identities of bidders will be made public in that auction.

38. *Petitions*. GTE Service Corporation (GTE) requests clarification that the Commission will apply the general bidder disclosure policy adopted in the *Second Memorandum Opinion and Order* to the broadband PCS auctions.[93] GTE alleges that bidder disclosure is needed to help bidders formulate successful bidding strategies.[94] GTE further argues that bidder disclosure would maximize information flow and efficient bidding without sacrificing consumer safeguards.[95]

39. *Decision*. As noted in the Commission's Public Notice announcing the first broadband PCS auction, Report No. AUC-94-04 (released Sept. 19, 1994), we have decided to apply the bidder disclosure policy adopted in the *Second Memorandum Opinion and Order* to the first broadband PCS auction. As we indicated in the *Second Memorandum Opinion and Order*, we will generally identify bidders before each auction.[96] We reserve the authority, however, to conceal bidder identities if further experience demonstrates it is desirable to do so. Consequently, we reserve the option of withholding bidder identities on an auction-by-auction basis. Therefore, for each broadband auction, we will decide whether to identify qualified auction participants and will announce our decision in a Public Notice released before each auction.

**3. Short and Long Form Applications**

40. The Commission adopted a two-part application procedure in the *Fifth Report and Order* consisting of short- and long-form application obligations.[97] The Commission will initiate the application process by Public Notice, announcing when we will accept short-form applications to participate in an auction for specific broadband PCS licenses.[98] The notice, in part, will specify the licenses that will be available, identify the time and place of an auction in the event that mutually exclusive applications are filed, and announce a deadline by which short-form applications must be filed.[99] After an auction, winning bidders will be required to file a long-form application. The long-form applications must be submitted by a date specified by Public Notice, generally within ten business days after the close of bidding. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice, which will open the filing window for petitions to deny.[100]

41. *Petitions*. Pacific Bell Mobile Services (Pacific Bell) requests clarification that the Commission will establish short-form filing deadlines prior to each separate auction, instead of a single submission date for all three auctions.[101] Pacific Bell maintains that this clarification is needed to provide flexibility in formulating back-up strategies. Pacific Bell also requests that the Commission issue separate Public Notices announcing the submission of long-form applications after each auction.[102] Pacific Bell alleges that separate notices would facilitate the expeditious deployment of PCS services.

42. *Decision*. As demonstrated by our September 19, 1994 Public Notice announcing the first broadband PCS auction, we plan to announce the deadlines for submitting short-form and long-form applications separately for each broadband PCS auction. We intend to establish a separate submission date for each auction, as Pacific Bell requests. Indeed, we have been conducting the process in this manner for narrowband PCS. Thus, we plan to specify by Public Notice prior to each broadband auction the filing date for short-form applications and the accepted applica-

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1993, at 6-8 (application requirements and standard); Liberty Cellular, Inc. Comments, filed Nov. 10, 1993, at 5-7 (applications requirements, amendment of applications); Pacific Bell Comments, filed Nov. 10, 1993, at 21-28 (application standard and requirements, amendment of applications, petitions to deny); Rural Cellular Association Comments, filed Nov. 10, 1993, at 2-3, 20-21 (application requirements and standards). AIDE itself commented on several aspects of the application and processing rules proposed in the *Notice*. AIDE Comments, filed Nov. 10, 1993, at 10-13 (application requirements).

[89] *Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). An agency must be free to adopt a final rule not described exactly in the *Notice*, where the difference involved is "sufficiently minor." otherwise, agencies could not change a rule in response to valid comments without beginning the rulemaking anew. *See National Cable Television Assoc., Inc. v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984).

[90] *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 42.

[91] *Id.*

[92] *Id.*

[93] GTE Petition at 12.

[94] *Id.*

[95] *Id.* at 12-13.

[96] *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 42.

[97] *Fifth Report and Order*, FCC 94-178 at ¶ 60.

[98] *Id.* at ¶ 61.

[99] *Id.*

[100] *Id.* at ¶ 81.

[101] Pacific Bell Petition at 4-5.

[102] *Id.* at 8.

tions for each auction. Similarly, we plan to specify by Public Notice after each auction is conducted the long-form filing dates and accepted long- form applications. Our experience with the nationwide narrowband PCS auctions to date shows that these procedures work well to facilitate efficient operation of the competitive bidding process. We do reserve the right, however, to alter these procedures if we find there is a need to do so in the future.

**4. Upfront Payments**

43. In establishing its auction methodology for PCS, the Commission set forth several provisions to ensure that winning bidders will have the resources needed to obtain their licenses and construct their systems and to discourage insincere bidding. For example, short-form applicants must certify that they are financially qualified pursuant to Section 308(b) of the Communications Act, and must disclose certain information concerning the real party or parties in interest (*e.g.*, major stockholders, partners, joint ventures).[103] Additionally, the Commission requires accepted short-form applicants to make a substantial upfront payment, and has established significant bid withdrawal and default penalties.[104]

44. *Petitions.* Roland A. Hernandez (Hernandez) and GTE petition on the issue of upfront payments. Specifically, Hernandez requests that the Commission require bidders to demonstrate their ability to pay the entire down payment and meet the terms of an installment payment plan when the short-form application is filed.[105] Hernandez maintains that this modification is needed to keep non-legitimate bidders from corrupting the bidding process. Hernandez further notes that, to the extent insincere bidders artificially distort the bidding and force out legitimate bidders, the Commission's policy of promoting designated entity ownership is compromised.[106] In addition, GTE requests that multi-market bidders be permitted to make use of an interest-bearing evergreen deposit account for upfront payments.[107] GTE maintains that the present rules unnecessarily restrict the flexibility of multi-market bidders to participate in different bidding rounds, and may discourage full and active participation by some interested parties.[108]

45. *Decision.* With respect to the concerns raised by Hernandez, we believe that the existing requirements for broadband PCS auction applicants provide an adequate measure of a party's ability to pay. As indicated above, short-form applicants must make a substantial upfront payment and subject themselves to significant bid withdrawal and default penalties in order to participate in the auctions. One of the principal purposes of these requirements is to ensure that only serious and financially qualified bidders participate in the auction. Thus far, our experience with the narrowband PCS nationwide license auction suggests that our requirements are sufficiently stringent to ensure that auction participants have the financial resources to purchase the spectrum for which they intend to bid.[109] We willp daddress Hernandez's concern about the ability of designated entities to make their installment payments in our separate reconsideration order on designated entity issues.

46. Concerning GTE's request, we have considered the issue of paying auction applicants interest on their upfront payments before in the *Second Memorandum Opinion and Order* on auctions. We reject such a proposal for now because of the administrative difficulties that are posed by the need to track and transfer applicant funds, and because we lack the legal authority to engage in such financial activity. We have sought legislative authority in the 1994 House and Senate FCC authorization bills to establish interest-bearing accounts so that auction applicants may accrue interest on upfront payments.[110] If such authority is granted we may choose to pay interest.

**5. Collusion and Settlement Restrictions**

47. In the *Fifth Report and Order*, the Commission prohibited bidders from discussing the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.[111] The Commission further required bidders to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements relating to the competitive bidding process.[112] We also determined that auction applicants would not be permitted to make any ownership changes or changes in the identification of parties to bidding consortia once a short-form application is filed.[113] We recently modified these rules on reconsideration of our general competitive bidding rules to permit bidders who have not applied for any of the same licenses to enter into bidding agreements during the course of an auction.[114] We also decided to allow applicants to amend their Form 175 applications to make ownership

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[103] *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 166; *Fifth Report and Order*, FCC 94-178 at ¶ 62.

[104] *Fifth Report and Order*, FCC 94-178 at ¶ ¶ 65-71, 75-77. Specifically, we require an upfront payment of $0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates bidding on in any single round of bidding. Payments must be made to the Commission's lock-box bank by a date certain, which we will announce in a Public Notice and which generally will be no later than 14 days before the scheduled auction.

[105] Hernandez Petition for Reconsideration (Hernandez Petition), filed Aug. 22, 1994, at 5.

[106] *Id.*

[107] GTE Petition at iii. We note, however, that GTE did not raise this argument in the body of its Petition.

[108] *Id.*

[109] We note, for example, that none of the narrowband auction winners have defaulted on their payment obligations. Hernandez contends that the recent IVDS auction defaults suggest that stricter financial scrutiny is needed for broadband PCS. In this regard, we observe that the financial requirements for both narrowband and broadband PCS are already more stringent than those required for IVDS auction participants. *Compare* Section 98.16 (c)(3) *with* Section 24.706.

[110] *See* H.R. 4522, 103d Cong. 2d Sess., 140 Cong. Rec. H4164 (May 26, 1994); and S. 2336, 103d Cong., 2d Sess., 140 Cong. Rec. S10142 (July 29, 1994).

[111] *Fifth Report and Order*, FCC 94-178 at ¶ 91.

[112] *Id.*

[113] *Id.* at ¶ 63.

[114] *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 51.

changes after the filing deadline has passed, provided such changes do not result in a change of control of the applicant.[115]

48. *Petitions.* McCaw Cellular Communications, Inc. (McCaw) and AIDE request changes to our collusion and settlement restrictions. In particular, McCaw requests that the Commission relax its anti-collusion rule to permit bidders to form, during the course of an auction, consortia with other bidders that have dropped out of bidding for a particular license or group of licenses.[116] McCaw maintains that this revision would help ensure that bidders have greater flexibility to increase their competitiveness in the auction by combining their resources. McCaw further notes that its proposed modification would promote the participation of designated entities, small companies and other entities with limited access to capital.[117]

49. In its petition, AIDE observes that both the Communications Act and the Commission have a well-established policy favoring full settlements of mutually exclusive applications, and alleges that the Commission erred in adopting rules which prohibit post-filing settlements.[118] AIDE maintains that the Commission's prohibition is inconsistent with Sections 309(j)(6)(A) and (E) of the Communications Act, which indicate that settlements are in the public interest.[119] AIDE further notes that the Commission never explained the regulatory or statutory purposes which its settlement prohibition was intended to satisfy.[120] Finally, AIDE states that the prohibition against settlements represents poor public policy, because potential licensees would be arbitrarily precluded from structuring business arrangements between themselves once the pre-bid documents had been filed.[121]

50. *Decision.* We decline to liberalize our collusion and settlement restrictions for broadband PCS in the manner requested by either McCaw or AIDE. We continue to believe that a prohibition against agreements and alliances concerning bidding between applicants bidding for the same licenses is a prudent deterrent to collusion that should have only a minimal and temporary effect on bidders' flexibility. As we stated in the *Second Report and Order*, our rules prohibiting collusion serve the objectives of the Budget Act by preventing applicants, especially the largest companies, from entering into agreements to use bidding strategies that divide the market to the disadvantage of other bidders.[122] Also, we want to avoid the problem of entities filing applications solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal. Overall, we believe that auctions are likely to result in more efficient assignments than settlements because they reduce the transaction cost of putting a license in the hands of the applicant that values it most highly.

51. With regard to McCaw's proposal, the fact that one bidder has withdrawn its application before entering into a consortium with another bidder does not reduce the importance of our collusion rules, even if we forbid bidders to communicate with other bidders competing for the same license until after a formal withdrawal has taken place. We are concerned that if we permitted such consortium arrangements to occur, particularly in an environment where bidder identities are known, undue pressure might be brought to bear on smaller bidders to withdraw in exchange for teaming up with other larger bidders, or sham applications might be filed to demand payment from other applicants. In general, we are concerned that McCaw's proposal would create incentives for parties to collude and behave in an anti-competitive manner. While we recognize that allowing consortia to occur could enable many smaller applicants to pool their resources to win licenses, we believe the risks of allowing such arrangements between applicants for the same license (even when one applicant has withdrawn) outweigh the benefits at this time.

52. We also reject AIDE's contention that the Commission lacks the authority under the Communications Act to preclude settlements between mutually exclusive applicants for auctionable "licenses.[123] While the Commission has an established policy of favoring settlements in some contexts, it is entirely within our authority to restrict or prohibit settlements if we find such agreements would not be in the public interest.[124] At this time, we find that post-filing settlements between applicants for the same license in the broadband PCS competitive bidding process would not serve the public interest for reasons stated above. We believe that nothing in the language or legislative history of Section 309(j) contradicts this view. Consequently, we are amending our rules to eliminate Section 24.829(b), which (as AIDE suggested in its petition) is inconsistent with our collusion rules contained in Section 1.2105 of the Rules.

53. In order to provide bidders sufficient time and greater flexibility to attract capital, however, we make several modifications to our collusion rules and policies adopted in the *Fifth Report and Order* and in our reconsideration of the generic auction rules. First, we recognize that an entity may hold non-controlling ownership interests in two or more bidders, and that those bidders may aggregate more PCS spectrum cumulatively than a single entity is entitled

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115 *Id.* at ¶ 52.

116 McCaw Petition at 10.

117 *Id.* at 10-11.

118 AIDE Petition at 5-13.

119 *Id.* at 11. Section 309(j)(6) provides:

(6) Rules of Construction - Nothing in this subsection [309(j)], or in the use of competitive bidding, shall -

(A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;

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(E) Be construed to relieve the Commission of the obligation in the public interest to continue to use ... negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings.

120 AIDE Petition at 11.

121 *Id.* at 13.

122 *Second Report and Order*, 9 FCC Rcd 2348 at ¶ ¶ 221-224.

123 AIDE Petition at 9-10.

124 In the broadcast context, for example, while we have allowed settlements between applicants for construction permits, such agreements have been significantly restricted in recent years. *See Report and Order* in MM Docket No. 90-263, 6 FCC Rcd 85 (1990), *recon. Memorandum Opinion and Order*, 6 FCC Rcd 2901 (1991) (limiting settlements between mutually exclusive applicants for broadcast construction permits).

to hold. In such cases, we will permit divestiture of non-controlling interests to bring the entities into compliance with the PCS spectrum aggregation limits provided such divestiture is completed within 90 days of grant of the license.[125] Such post-auction divestiture will enable investors to finance more than one bidder without risking default penalties if both bidders, for example, win licenses which in combination exceed our aggregation limits.

54. Procedurally, if entities with a common non-controlling ownership interest aggregate more PCS spectrum among them than a single entity is entitled to hold, we will require that the long-form applications for broadband PCS licensing be accompanied by a signed statement from the applicant that sufficient properties will be divested within 90 days of the license grant to bring the broadband PCS licenses held within the permitted aggregation limits. If the applicant is otherwise qualified, the applications will be granted subject to a condition that the licensee come into compliance with the PCS spectrum aggregation limits within 90 days of grant. Within 90 days of license grant, the licensee must certify to the Commission that the applicant and all parties to the application have come into compliance with our PCS spectrum aggregation limits. If the PCS licensee fails to submit this certification within 90 days, we will invoke the condition on all broadband PCS licenses won by the applicant in the auction, cancelling them immediately and imposing the default penalty. In addition, we may investigate whether the certifications on divestiture are evidence of misrepresentations that call into question the party's qualification to hold any PCS licenses. If a buyer has not been secured in the required period of time, the PCS licensee may divest the prohibited interest to an interim independent trustee, as long as the applicant has no interest in or control of the trustee. The trustee may dispose of the interest as it sees fit. In no event, however, may the trustee retain the property for longer than six months.

55. Also, as indicated *supra*, our auction collusion rules have been revised to permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of an auction.[126] We stated in our *Third Memorandum Opinion and Order* on narrowband PCS auctions that where bidders have not applied for any of the same licenses there is little risk of anti-competitive conduct with respect to a single license.[127] We reach the same conclusion with respect to broadband PCS. The relaxed collusion rules, which we will apply in the broadband PCS context, will permit bidders to have greater flexibility to compete in the auction by combining their resources, provided that no change of control of any applicant takes place. We wish to clarify that we intended these provisions to apply to applicants that have not applied for licenses in any of the same geographic license areas, *i.e.*, the same MTAs for A and B block licenses or the same BTAs for other broadband PCS licenses.[128]

56. As noted above, we also modified our generic auction rules to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant.[129] We now modify Section 24.822 (b) to clarify the applicability of this provision to broadband PCS. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the applicant. Amendments to FCC Form 175 must be filed with the Commission within two business days of any such change. Our experience in the nationwide narrowband PCS auction demonstrated that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change of control or discussions that violate our anti-collusion rules. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change. Again, we clarify that this change applies only to applicants that have not applied for licenses in any of the same geographic license areas.[130]

57. We will also permit ownership changes in which consortium investors drop out of bidding consortia, even if control of the consortium changes as a result.[131] We do not wish to restrict some members of consortia from continuing to bid even though other members of the consortia wish to drop out of the bidding. We emphasize that members that are removed from a consortium may not subsequently bid individually or become involved with another bidder in bidding on any license for which the consortium had applied. Bidders must submit a revised Form 175 to reflect the change in ownership.

58. We also wish to clarify an aspect of our rules dealing with the information that applicants must provide to the Commission with their Form 175 and Form 401 applications. Section 24.813(a)(1) of the Commission's Rules, 47 C.F.R. §24.813(a)(1), states among other things that applicants must provide "a list of any business five percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant." (Emphasis added.) Read literally, this provision would require applicants to ascertain the holdings in other concerns of every one of their stockholders, regardless of how small that stockholder's stake in the applicant may be. This was not our intent, and we take this opportunity to

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[125] We adopted a similar provision in our reconsideration of the narrowband auction rules. *Third Memorandum Opinion and Order*, FCC 94-219 at ¶ 29.

[126] *See Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 51; *see also* Section 1.2105 (c)(3).

[127] *Third Memorandum Opinion and Order*, FCC 94-219 at ¶ 31.

[128] If, for instance, one applicant has applied for licenses on block A in MTAs 1, 2, and 3, and another applicant has applied for licenses on block B in MTAs 3, 4, and 5, these applicants may not hold discussions or form consortia or joint bidding arrangements.

[129] *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 52.

[130] Of course, formation of consortia, bidding agreements, and new ownership arrangements remains subject to Commission review under the public interest standard, and we would expect that entities entering into such arrangements would comply with all relevant Commission policies and all other applicable laws, *e.g.*, the antitrust laws.

[131] *See ex parte* submission of Comcast Corporation, Oct. 7, 1994.

amend this rule to clarify that only holdings in other concerns that are held by attributable shareholders in the applicant need be disclosed.[132]

59. Finally, we note that in the *Second Memorandum Opinion and Order*, we clarified the applicability of the collusion rules to cases where an applicant has a common ownership interest with another applicant.[133] We stated that, unless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, we will prohibit these parties from communicating concerning their bidding strategies. As we stated in the *Second Memorandum Opinion and Order*, this prohibition will hold even if the other bidder is identified on the applicant's short-form application as having a common ownership interest with the applicant.[134] Communication among bidders concerning matters unrelated to the license auctions, however, will be permitted.

60. Accordingly, we are retaining the collusion rules in the broadband PCS context with the modifications set forth above.[135] We believe that these modifications will ensure that the bidding process is competitive and will encourage formation of a competitive post-auction market structure.

### D. Miscellaneous

#### 1. Antenna Height Restrictions

61. The Commission established antenna height restrictions in the *Fifth Report and Order* which provide, in part, that no antenna structure, including radiating elements, tower, supports and all appurtenances, may be higher than 61 meters above ground level unless prior Commission approval is obtained.[136]

62. *Petition.* American Personal Communications (APC) requests that the antenna height restrictions be rescinded because they were adopted without comment in a proceeding intended to adopt PCS auction and application processing rules, not substantive technical ones.[137] Noting that the Commission has already established antenna safety and interference provisions, APC also maintains that the rule is unnecessary. APC further argues that the rule would impose a regulatory burden on PCS providers that is not imposed on either cellular or enhanced specialized mobile radio (ESMR) providers, a result that is incompatible with the Commission's efforts to achieve regulatory parity.[138] Finally, APC maintains that the implementation and enforcement of this rule would consume significant industry and staff resources without gaining any appreciable benefit.[139]

63. *Decision.* In light of APC's petition, we believe that issues relating to antenna height are best resolved in another proceeding, to afford a greater opportunity for industry comment. Our primary concern when we adopted this rule section was to promote the safe location and identification of PCS antennas, particularly in areas around airports. There may be less administratively burdensome methods, however, of obtaining the same result. Moreover, Section 24.816, may be duplicative since Part 17 of our rules already provides for similar antenna height and use safeguards.[140] We therefore rescind the antenna height restrictions adopted in the *Fifth Report and Order*, but will examine the issue in a future proceeding on revisions to Part 24 of our rules. The substantive merits of APC's petition, as well as the arguments set forth in oppositions filed by PCIA and DCR Communications, Inc., will be considered at that time.[141]

#### 2. Restrictions on Cellular Participation

64. In the *Fifth Report and Order*, we reserved specific spectrum blocks in broadband PCS for bidding exclusively by entities that, together with their affiliates and certain investors, have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million.[142] We determined that designation of these "entrepreneurs' blocks" was needed to ensure that small entities have a meaningful opportunity to participate in the acquisition and provision of broadband PCS services.[143]

65. *Petition.* GTE alleges that our entrepreneurs' block plan, which is intended to ensure that designated entities have opportunities to acquire licenses and provide PCS service, restricts the ability of cellular carriers to participate in the provision of PCS.[144] Specifically, GTE argues that many cellular operators can now only bid on a maximum of 20 MHz instead of 30 MHz of spectrum, which will impair their ability to compete with other PCS operators. Accordingly, GTE requests that we eliminate several cellular restrictions adopted in our broadband PCS service

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[132] By "attributable" shareholder we mean a shareholder that holds an interest of 5 percent or more in a bidder or that holds an attributable interest in a bidder through the operation of the multiplier.

[133] *Id.* at ¶ 53.

[134] Of course, applicants will also be subject to existing antitrust laws. For example, we would expect that this would prohibit discussions with respect to bid prices between any applicants who have applied for licenses in the same geographic market. *See United States v. Champion Int'l Corp.*, 557 F.2d 1270 (9th Cir.), 434 U.S. 938 (1977); *c.f., e.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), *modified and aff'd* 175 U.S. 211 (1899). In addition, agreements between two or more actual or potential competitors to submit collusive, non-competitive or rigged bids are *per se* violations of Section One of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. *See, e.g., United States v. MMR Corporation (LA)*, 907 F.2d 489 (5th Cir. 1990); *United States v. W.F. Brinkley & Sons Construction Co.*, 783 F.2d 1157 (4th Cir. 1986); *United States v. Finis P. Renest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), cert. denied, 423 U.S. 874. Similarly, agreements between actual or potential competitors to divide or allocate territories horizontally in order to minimize competition are *per se* violations of the Sherman Act (United States v. Topco, 405 U.S. 596 (1972); *Affiliated Capital Corporation v. City of Houston*, 700 F. 2d 226, 236), and such agreements are anticompetitive regardless of whether the parties split a market in which they both do business or whether they merely reserve one market for one and another for the other. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990).

[135] *See Second Report and Order*, 9 FCC Rcd 2348 at ¶ 225.

[136] *Fifth Report and Order*, FCC 94-178 at Appendix B (Section 24.816). Section 24.816 also contains restrictions on height and use of antennas around airports.

[137] APC Petition for Reconsideration (APC Petition), filed Aug. 22, 1994, at 4.

[138] *Id.*

[139] *Id.*

[140] 47 CFR Part 17.

[141] PCIA Opposition at 1-3; DCR Communications, Inc. Opposition at 8.

[142] *Fifth Report and Order*, FCC 94-178 at ¶ 121.

[143] *Id.*

[144] GTE Petition at 2.

rules proceeding.[145] First, GTE encourages the Commission to eliminate the cellular-PCS cross-ownership restrictions to permit cellular carriers to obtain 30 MHz of spectrum in any MTA in the country.[146] Next, GTE requests we modify our geographic overlap standard for purposes of determining cellular eligibility.[147] Specifically, GTE requests we adopt an "effective pops" test that it has previously advocated in the PCS proceedings. Finally, GTE requests that we permit cellular carriers to acquire up to 30 MHz of spectrum, so long as they divest the appropriate cellular properties within 90 days of the PCS license grant.[148]

66. *Discussion.* We reject GTE's proposal to eliminate certain cellular restrictions, as its request is outside the scope of this proceeding. Rather, those restrictions were appropriately addressed in our broadband PCS service rules proceeding, GN Docket No. 90-314.[149] As Pacific Bell points out in its Opposition, the Commission considered arguments identical or similar to the ones raised by GTE in that proceeding and concluded that our restrictions strike an appropriate balance between fostering broad participation in PCS and ensuring that cellular operators do not exert undue market power.[150] Accordingly, we will retain our present restrictions on cellular participation in the provision of PCS. We will address the merits of GTE's claim that they will be unfairly disadvantaged by the creation of entrepreneurs' blocks in our reconsideration order on designated entity concerns.[151]

## IV. PROCEDURAL MATTERS

### A. Final Regulatory Flexibility Analysis

67. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the *Memorandum Opinion and Order* is as follows:

68. *Need for, and Purpose of, this Action.* As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the *Notice of Proposed Rule Making* in this proceeding and published Final Regulatory Flexibility Analyses within the *Second Report and Order* (at ¶ ¶ 299-302) and the *Fifth Report and Order* (at ¶ ¶ 219-222). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

69. *Summary of the Issues Raised by the Public Comments.* No commenters responded specifically to the issues raised by the *Fifth Report and Order*. We have made some modifications to the proposed requirements as appropriate.

70. *Significant Alternatives Considered and Rejected.* All significant alternatives have been addressed in the *Fifth Report and Order* and in this *Memorandum Opinion and Order*.

### B. Ordering Clauses

71. Accordingly, IT IS ORDERED that the petitions for reconsideration ARE GRANTED to the extent described above, DEFERRED with respect to entrepreneurs block issues and DENIED in all other respects.

72. IT IS FURTHER ORDERED that Part 24 of the Commission's Rules IS AMENDED as set forth in Appendix B.

73. IT IS FURTHER ORDERED that the rule amendments made herein WILL BECOME EFFECTIVE immediately upon publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).[152]

74. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

### Appendix A

**List of Parties who Filed Petitions for Reconsideration in PP Docket 93-253**

American Personal Communications (APC)

Association of Independent Designated Entities (AIDE)

BET Holdings, Inc. (BET)

Cellular Telecommunications Industry Association (CTIA)

Century Telephone Enterprises, Inc. (Century)

Citizens Utilities Company (Citizens)

Columbia PCS, Inc. (Columbia PCS)

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[145] *Id.* at 6-8. *See Second Report and Order* in GN Docket No. 90-314, 8 FCC Rcd 7700 (1993) at ¶ ¶ 97-111.

[146] GTE Petition at 6.

[147] *Id.* at 6-7.

[148] *Id.* at 7-8.

[149] *Second Report and Order* in GN Docket No. 90-314, 8 FCC Rcd 7700 (1993) at ¶ ¶ 97-111, *recon. Memorandum Opinion and Order*, FCC 94-144 (Rel. June 13, 1994) at ¶ ¶ 98-146.

[150] Pacific Bell Opposition at 10-11. *See also Second Report and Order*, 8 FCC Rcd 7700 at ¶ 108.

[151] *See also* Omnipoint Opposition at 11-12.

[152] Pursuant to 5 U.S.C. § 553(d)(3), we conclude that "good cause" exists to have the rule changes take effect immediately because a delay would not provide applicants with sufficient time to finalize their bidding strategies and business plans for the upcoming broadband PCS auctions. Immediate implementation of the rule changes set forth herein also provides applicants with the required certainty to proceed with their bidding and business strategies, alleviating concerns that last-minute modifications to our Rules would impede the success of their auction plan. *See* 5 U.S.C. § 553(d)(1).

Cook Inlet Region, Inc. (Cook Inlet)

EATELCORP, Inc. (EATEL)

GTE Service Corporation (GTE)

Hernandez, Roland A. (Hernandez)

Hicks and Ragland Engineering Company, Inc. (Hicks and Ragland)

Karl Brothers, Inc. (Karl Brothers)

Lehman Brothers (Lehman)

MasTec, Inc. (MasTec)

McCaw Cellular Communications, Inc. (McCaw)

Metrex Communications Group, Inc. (Metrex)

Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc. (Joint) (MEANS/SDN)

National Association of Black Owned Broadcasters, Inc. (NABOB)

National Paging and Personal Communications Association (NPPCA)

Omnipoint Communications, Inc. (Omnipoint)

Pacific Bell Mobile Services (Pacific Bell)

Pacific Telecom Cellular, Inc. (PTC)

Small Business PCS Association (SBPCS)

Telephone Electronics Corporation (TEC)

United States Interactive & Microwave Television Association (USIMTA)

**Oppositions filed in Response to Petitions for Reconsideration**

Association of Independent Designated Entities (AIDE)

American Personal Communications (APC)

BET Holdings, Inc. (BET)

Columbia PCS, Inc. (Columbia)

Cook Inlet Region, Inc. (Cook)

DCR Communications, Inc. (DCR)

Encompass, Inc. (Encompass)

Mankato Citizens Telephone Co. (Mankato)

MasTec (MasTec)

McCaw Cellular Communications, Inc. (McCaw)

Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc.

Omnipoint Communications, Inc. (Omnipoint)

Pacific Bell Mobile Services (PacBell)

Personal Communications Industry Association (PCIA)

Telephone and Data Systems, Inc. (TDS)

United States Telephone Association (USTA)

Vanguard Cellular Systems, Inc. (Vanguard)

**Replies filed in Response to Petitions for Reconsideration**

BET Holdings, Inc. (BET)

City of Dallas (Dallas)

GO Communications Corporation (GO Comm.) (formerly Columbia PCS, Inc.) (Columbia PCS)

McCaw Cellular Communications, Inc. (McCaw)

Minnesota Equal Access Equal Access Network Services, Inc. and South Dakota Network, Inc. (Minnesota)

National Paging & Personal Communications Association (NPPCA)

Omnipoint Communications (Omnipoint)

Small Business Administration (SBA)

## Appendix B

## Rule Changes

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

**AUTHORITY: 47 U.S.C. §§ 154, 301, 302, 303, 309, and 332, unless otherwise noted.**

2. Section 24.703 is amended by revising paragraph (f) and adding paragraph (h) to read as follows:

**§ 24.703 Competitive bidding mechanisms.**

* * * * *

(f) *Activity Rules.* The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, bidders will be entitled to request and be granted waivers of such rule. The Commission will specify the number of waivers permitted in an auction, the frequency with which they may be exercised, and the method of operation of waivers by Public Notice prior to each auction.

* * * * *

(h) *Bidder Identification During Auctions.* The Commission may choose, on an auction-by-auction basis, to release the identity of the bidders associated with bidder identification numbers. The Commission will announce by Public Notice before each auction whether bidder identities will be revealed.

3. Section 24.813(a)(1) is amended to read as follows:

**§ 24.813 General application requirements.**

(a) * * *

(1) A list of any business five percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant.

* * * * *

4. Section 24.816 is removed and reserved.

5. Section 24.822(b) is revised to read as follows:

**§ 24.822 Amendment of application to participate in auction for licenses in the broadband Personal Communications Services filed on FCC Form 175.**

* * * * *

(b) In broadband PCS, applicants will be permitted to amend their Form 175 applications to make minor amendments to correct minor errors or defects such as typographical errors. Applicants will also be permitted to amend FCC Form 175 to make changes to the information required by § 24.813(a) (such as ownership changes or changes in the identification of parties to bidding consortia), provided such changes do not result in a change in control of the applicant and do not involve another applicant (or parties in interest to an applicant) who has applied for licenses in any of the same geographic license areas as the applicant. Amendments which change control of the applicant will be considered major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. *See also* Section 1.2105 of this Chapter.

6. Section 24.829 is amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

7. Section 24.833 is added to read as follows:

**§ 24.833 Post-auction divestitures.**

Any parties sharing a common non-controlling ownership interest who aggregate more PCS spectrum among them than a single entity is entitled to hold (See §§ 20.6(e), 24.710, 24.204, 24.229(c)) will be permitted to divest sufficient properties within 90 days of the license grant to come into compliance with the spectrum aggregation limits as follows:

(a) The broadband PCS applicant shall submit a signed statement with its long-form application stating that sufficient properties will be divested within 90 days of the license grant. If the licensee is otherwise qualified, the Commission will grant the applications subject to a condition that the licensee come into compliance with the PCS spectrum aggregation limits within 90 days of grant.

(b) Within 90 days of license grant, the licensee must certify that the applicant and all parties to the application have come into compliance with the PCS spectrum aggregation limits. If the licensee fails to submit the certification within 90 days, the Commission will immediately cancel all broadband PCS licenses won by the applicant, impose the default penalty and, based on the facts presented, take any other action it may deem appropriate. h)&Divestiture may be to an interim trustee if a buyer has not been secured in the required time frame, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the property as it sees fit. In no event may the trustee retain the property for longer than six months from grant of license.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**July 14, 1994**

**Released: July 14, 1994**

IN REPLY REFER TO:
1800B3-MJF/RDG

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In re: WRQI(FM), South Bristol Twp, New York
Great Lakes Wireless Talking Machine Co.
BLH-900314KC

Dear Counsel:

This letter is in reference to the following: (i) the Commission's March 7, 1994 letter regarding the remaining four complaints of blanketing interference caused by WRQI; (ii) the Commission's March 9, 1994 letter which reinstated WRQI's program test authority (PTA); (iii) the inspection conducted during the week of April 11, 1994 by the Commission's staff; (iv) the April 19, 1994 letter submitted by Thomas Jay Solomon, local counsel for the complainants located near the WRQI Oak Mount Road program test authority (PTA) tower site; (v) the April 21, 1994 letter submitted by Lawrence Roberts, Washington, DC counsel for the complainants; (vi) the final interference report dated April 29, 1994 submitted by Edwin N. Lavergne, communications counsel for WRQI; (vii) the Commission's April 29, 1994 letter which extended PTA through June 1, 1994 and requested clarification of the location of WRQI's PTA facilities; (viii) the April 29, 1994 letter from Thomas Jay Solomon with 11 attachments (including letters from Patrick Crowley, Pasty Muller, Dorothy Talone, John Lucas, and Wayne and Debbie Ward); (ix) a supplement to the final report dated May 4, 1994 submitted by Edwin N. Lavergne which includes typed notes from Bruce Yerks; (x) the May 13, 1994 letter from Thomas Jay Solomon with current letters from the Talones, Mullers and Wards; (xi) the May 17, 1994 supplement submitted by Edwin N. Lavergne to WRQI's final interference report; (xii) the May 18, 1994 response to letters dated April 29, May 3, May 13, and May 16, 1994 from Edwin N. Lavergne; (xiii) the June 21, 1994 report of the field visit made by the Engineer In Charge of the Buffalo Field Office on June 16, 1994; (xiv) the June 16, 1994 letter from Edwin N. Lavergne, Esq.; and (xv) all other related filings.

**Background**

WRQI began program test operation on March 14, 1990. As of the Commission's March 7, 1994 letter, the Commission has found that WRQI has fulfiled its obligation to all but four of the 139 total complaints. As of the date of this letter, the staff has reviewed the above-referenced correspondence, inspected three of the complainants' homes and has determined that, out of the four outstanding complaints, one complaint is now deemed resolved because WRQI has fulfilled its obligation pursuant to 47 C.F.R. § 73.318. However, three complaints still remain unresolved. They are the complaints filed by Debbie and Wayne Ward (#9), Tom and Patsy Muller (#12) and Julie Marble (#139). The numbers refer to the numbered list contained in our previous findings of June 25, 1993.

**Resolved Complaint - Talone Residence (#1)**

Mrs. Dorothy Talone indicated on Attachment "B"[1] that her electronic equipment affected by interference from WRQI are the following:

(1) a SONY 32" television (Model Number KV32KBK25, Serial Number 130605951) located downstairs;

(2) a SONY television (Model Number KX5201, Serial Number 227526) located upstairs;

(3) an RCA television (Model Number 336M, Serial Number 1405454-12) located in a second upstairs bedroom;

(4) a SONY VCR (Model Number SL1+F 300, Serial Number 12582) located downstairs;

(5) a SONY VCR (Model Number SLV 595 HF, Serial Number 1008017) located downstairs;

(6) a Fisher VCR (Model Number FVH530, Serial Number 37760 - A8302) located upstairs;

(7) a Panasonic radio tuner (Model Number RA6500, Serial Number 85024-048024).

In addition, Mrs. Talone complained that a grounding rod installed by WRQI was left protruding above the ground.

[1] The Commission's March 7, 1994 letter included as Attachment "B" a form which requested specific information regarding Mrs. Talone's electronic equipment that, according to Commission record, still received blanketing interference. Attachment "B" was completed by Mrs. Talone and returned to the Commission.

In its final report dated April 29, 1994 ("final report"), WRQI states that David Groth of Radio Engineering Services and Bruce Yerks of Bruce Television were the technicians selected in March 1994 to work with Mr. Suffa, WRQI's engineering consultant, on the remaining unresolved complaints. WRQI states that to improve television reception at the Talone residence the following actions were taken: the master antenna was replaced; the masting, ground wire and guy wires were replaced; the coaxial lead-in cable was replaced with low loss RG-6 100% shielded cable; the grounding rod was buried; the rotor was repaired; FM traps were installed and jumpers between the VCR and the television in the living room were replaced with 100% shielded cable. WRQI states that these actions resulted in generally good television reception, except for ghosting on several channels. WRQI states that there was no change in reception or ghosting when on-off tests were conducted. In regard to interference to Mrs. Talone's radio tuner, WRQI states that it replaced the 300 ohm balanced input with a coaxial cable connection and that internal antenna wires were replaced with shielded coaxial cable. WRQI states that, as a result, the tuner showed good FM reception. In regard to telephone interference, WRQI states that ferrite chokes were installed on all telephone leads and no interference was observed on the telephones or answering machine. Therefore, WRQI believes that it has fulfilled its obligation under 47 C.F.R. § 73.318 with respect to the Talone residence.

On April 11, 1994, Robert D. Greenberg, Assistant Chief of the FM Branch, and David Viglione, Engineer In Charge of the Buffalo Field Office, inspected the Talone residence after WRQI's most recent efforts to resolve the blanketing interference. The staff observed the picture and audio quality of the Sony 32 inch television located on the first level of Mrs. Talone's house. WRQI was not heard over the audio portion of the television. Turning the WRQI transmitter on and off revealed that there was no change in the picture quality on any channel. They found TASO[2] 3 television reception with slight reflections and a multipath bar on the left side of the screen. The staff also spot-checked the other televisions in the house to confirm that no blanketing interference existed with the WRQI transmitter on.[3] Although Mrs. Talone states her reception was better prior to the erection of the tower, we cannot confirm the quality of Mrs. Talone's reception four years ago. Her whole antenna system is different, and distant towers may have been constructed which could cause multipath. The staff finds that Ms. Talone's television reception has been restored to the point where the operation of WRQI does not create interference. In addition, Mrs. Talone's Panasonic FM tuner (Model Number RA6500, Serial Number 85024-048024) received good reception and WRQI could only be heard on its assigned frequencies of 95.1 MHz and 95.5 MHz (a translator station).[4] Mrs. Talone's Panasonic AM tuner utilized an AM antenna that was built into the case. The AM tuner received a usable AM signal; however, interference from her own VCR, which was located right above the tuner, was noted on her AM tuner. The staff found, in totality, that there is good reception on her Panasonic radio. In regard to the telephone interference in the form of occasional static and breaks in her dial tone and service during calls, we have determined that these problems are a Rochester Telephone Company problem and are external to her house. Further, no WRQI interference was observed to the telephones during their inspection. This determination was based on the staff's observations and conversations between Mr. Viglione and Ms. Helen Payne, Manager at Seneca-Gorham Telephone Company.[5] Ms. Payne said Rochester Telephone Company will investigate Mrs. Talone's telephone problems.

In an April 28, 1994 letter, Mrs. Talone disputes WRQI's report and states that she is still experiencing the following problems: i) television viewing is not satisfactory on Channel 21, a local Rochester Station; ii) VCR taping and playback is not satisfactory; iii) AM stereo tuner signal is not satisfactory; and iv) her telephones are still not operating correctly. However, the conclusion of the Commission's staff based on the inspection is that WRQI has resolved all interference for which it is obligated pursuant to § 73.318. Accordingly, WRQI has fulfilled its obligation pursuant to 47 C.F.R. § 73.318 in regard to this complaint.

**Unresolved Complaints - Marble Residence (#139)**

In regard to Julie Marble's September 2, 1992 letter, WRQI was directed in the Commission's March 7, 1994 letter to determine if Ms. Marble is located inside or outside WRQI's blanketing contour and then take the appropriate action. Ms. Marble states that since she moved to Bristol on August 28, 1992, she has been receiving interference from WRQI on her televisions, cordless telephones and answering machine.

In the final report WRQI states that Ms. Marble resides within WRQI's blanketing contour. WRQI states that Ms. Marble filed her complaint more than two years after the station commenced operations from the Oak Mount Road tower. By declaration of Steve Chartrand, WRQI's current General Manager and President of Great Lakes Wireless Talking Machine Co., WRQI states that a letter was sent to Ms. Marble on September 1, 1992 containing FOB Bulletins Number 9, 12 and 16 and a pamphlet entitled "Something About Interference." This letter provided general information and suggestions for simple solutions to some generic interference problems. In addition, Paul Lechner, an assistant to Mr. Chartrand, telephoned Ms. Marble on March 30, 1994. Mr. Lechner states that Ms. Marble indicated that she still experiences sporadic interference with her answering machine, cordless telephone, and some portable radios.

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[2] The TASO grading scale was developed in 1958 by the Television Allocations Study Organization. It has been used over the years by observers in reporting their assessments of television picture quality. The six classifications of picture quality range from TASO 1, which is excellent reception, to TASO 6, which is unusable reception.

[3] All televisions and VCR's in the Talone house were connected to the master antenna system except the RCA television located in a second upstairs bedroom which utilized a "rabbit ears" antenna.

[4] WRQI operates a licensed translator station (BLFT-920903TA) on 95.5 MHz with 48 watts (H) ERP and 144 meters HAAT. An application (BPFT-930614TE) to increase the translator's power and height to 250 watts (H) ERP and 169 meters HAAT is currently pending.

[5] Seneca-Gorham Telephone Company is a subsidiary of the Rochester Telephone Company.

In a May 3, 1994 letter from Ms. Marble, she states that she bought her house on August 29, 1992 and within a week she contacted Mr. Chartrand regarding the blanketing interference. Ms. Marble states that her television interference was corrected by having cable installed; however, the expense is one she would prefer not to have to pay. In addition, Ms. Marble states that she is currently having problems with the following electronic equipment:

(1) a Kenwood stereo system, KRA 4040

(2) a SONY clock radio

(3) a G.E. clock radio

(4) a York clock radio

(5) a cordless AT&T 4600 telephone

(6) a G.E. telephone located in the living room

In response to Paul Lechner's statement that he had spoken with Ms. Marble by telephone on March 30, 1994 and that she had indicated that she received sporadic interference on her answering machine and some portable radios, Ms. Marble states that her radios are not portable because they have to be plugged into an electrical outlet. Furthermore, Ms. Marble states that she told Mr. Lechner that she was receiving interference on her cordless telephone, her regular telephone, stereo system and clock radios. In addition, regarding her current interference problem, Ms. Marble states that "Mr. Lechner informed me that he would talk to his supervisor and someone would be contacting me within the next week. As of May 3, 1994, I have not heard from anybody from Rocket-95."

In response to Ms. Marble's May 3, 1994 letter, WRQI denies that Ms. Marble's claims that she informed the station by telephone that she was having difficulties with several electronic devices which were not mentioned in WRQI's final report and that some of the statements made by Steve Chartrand and Paul Lechner in the final report were false.

It is obvious there is a dispute about what was said over the telephone. Regardless, since Ms. Marble filed her complaint after the first year of WRQI's program test authority operation, WRQI is not financially responsible for resolving her interference complaint even though she is located within WRQI's blanketing contour. However, WRQI is required to provide technical assistance to Ms. Marble. This entails the providing of information on the cause of the interference and also providing specific information on proper corrective measures.[6]

WRQI states that the following information was sent to Ms. Marble: FOB Bulletin Number 9 entitled "Booster Amplifier Interference to Television Reception;" FOB Bulletin Number 12 entitled "Locating and Eliminating Electrical Interference to Television and Radio Reception;" and FOB Bulletin 16 entitled "FM Interference to TV and FM Radio Reception." However, these bulletins do not provide the detailed technical assistance needed to remedy her blanketing interference. Specifically, Bulletins 9 and 12 do not apply to radio receiver blanketing interference and Bulletin 16 contains only a general section on blanketing interference information and offers no specific technical information to alleviate interference as required by §73.318. Bulletin 16 states that "[i]f you are experiencing FM blanketing interference, contact the chief engineer of the FM station for assistance." Also, the pamphlet entitled "Something About Interference" does not address radio receiver blanketing interference. These bulletins and pamphlet were written to provide basic information to the general public regarding various types of interference.

We believe that the information provided Ms. Marble was not specific enough for her to understand how to resolve the blanketing interference to her radios that plug into an electrical outlet. In this case, WRQI should have provided specific details to Ms. Marble about proper corrective measures to resolve her interference. For example, WRQI should have provided Ms. Marble with diagrams and descriptions which explain how and where to use radiofrequency chokes, ferrite cores, Microwave Filter Company filters and/or shielded cable. In addition, WRQI should have recommended replacement equipment that would work better in the high radiofrequency fields. This information should have been known to WRQI based on its experience in resolving blanketing interference.

Therefore, WRQI has not fulfilled its obligation pursuant to 47 C.F.R. § 73.318. Accordingly, we find this complaint IS NOT RESOLVED.

**Ward Residence (#9)**

The Wards indicated on Attachment "C"[7] that their electronic equipment affected by blanketing interference from WRQI are the following:

(1) a GE Super Radio (Model Number 7-2887A);

(2) a JVC Boom Box (Model Number PC-W150, Serial Number 127C2502);

(3) another Boom Box;

(4) an AT&T Answering Machine with Telephone Affixed (Model Number 1225-2205H, Serial Number 91156G);

(5) a Princess Telephone;

(6) a JVC Dual Cassette Player (Model Number TD-W106, Serial Number 116C0820);

(7) a Phillips Stereo Tuner (Model Number FR910PBK02, Serial Number 16654658);

(8) a Phillips 910 CD Player (Model Number CD910P, Serial Number 15178972);

(9) a Fisher Audio System (Model Number 8720D);

(10) a SONY VCR (Model Number SLV700HF, Serial Number AK8SLV700HF).

In addition, on Attachment "C," the Wards state that they also receive interference on an AM/FM digital clock radio with dual alarms, as well as interference to television reception.

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[6] *See FM Broadcast Station Blanketing Interference*, FCC 84-514, 57 RR 2d 126 (1984) at paragraph 20.

[7] The Commission's March 7, 1994 letter included as Attachment "C" a form which requested specific information regarding the Wards' electronic equipment that, according to Commission record, still received blanketing interference. Attachment "C" was completed by the Wards and returned to the Commission.

In the final report WRQI states that it was not able to modify all of the ten items listed on Attachment "C" and the additional AM/FM digital clock radio with dual alarms to be interference free; however, it was able to modify most of the equipment. Specifically, WRQI states in its report that:

(1) The GE Super Radio had a slight image of WRQI at 89.7 MHz; however, this image does not impair the reception of stations to which the Wards listen. Mr. Groth offered to replace the GE Super Radio with a high quality Phillips stereo system (Phillips FR-70); however, Mrs. Ward rejected this offer.

(2) The two boom boxes located in the children's rooms experienced blanketing interference on several channels which could not be corrected. Accordingly, they were replaced with two high-quality Phillips FR-70 stereo systems.

(3) All telephone wiring within the Ward home (with the exception of the Kitchen feed) was replaced with Beldon brand twisted pair audio cable, and a radiofrequency interference filter was installed on the main incoming telephone line. The telephone answering machine was replaced with a digital AT&T Model 1810. A new Princess telephone was installed in the daughter's bedroom. Ferrite chokes were installed on the telephone lead wires close to the sets of all telephones in the house. There was no observed interference to the new answering machine or to the telephones in the home.

(4) The fixed stereo cables associated with the cassette player, the Phillips stereo tuner and the Phillips DC player were carefully bundled, and a ferrite unit was attached. In addition, a flat lead dipole antenna was installed on the Phillips stereo tuner. A tunable FM trap was installed on the antenna input terminals. Also, a capacitor was installed to connect the radiofrequency chokes on the power supply to the Phillips tuner. As a result of these repairs, no blanketing interference was observed.

(5) The Fisher audio system in the living room was not hooked up or evaluated.

(6) The following steps were taken to improve the television reception: (a) the cable drop from the street to the Ward residence was completely replaced; (b) the antenna rotor was replaced; (c) shielded low-loss coaxial cable was installed from the antenna to the rear of the television set; (d) shielded jumpers were installed for the VCR and television set; (e) a new A/B switch was installed; and (f) a grounding block was installed for the cable television wire where it enters the house. WRQI states that, as a result of these modifications, off-air television reception was reported as generally good. However, some channels, such as 21 and 31, received poor reception. In the opinion of WRQI's consulting engineer, this is not due to FM blanketing interference from WRQI but is due to multipath and other environmental conditions not caused by WRQI.

(7) With respect to the Wards clock radios, WRQI states that the station provided the Wards with two new replacement Proton clock radios, which functioned well and were not subject to any blanketing interference.

For the reasons stated above WRQI believes that it has fulfilled its obligation under § 73.318.

On April 12, 1994, Mr. Greenberg and Mr. Viglione inspected the Ward residence after WRQI's most recent efforts to resolve the blanketing interference. The staff observed the picture and audio quality of the Zenith System 3 color television in the Ward's living room. They found TASO 3 television reception with slight reflections and a multipath bar on the left side of the screen. However, on the whole, there was a useable picture. WRQI was not heard over the audio portion of the television. Turning the WRQI transmitter on and off revealed that there was no change in the picture quality on any channel. They checked the Ward's television reception using both the antenna system on the roof of the house and cable. Also, in regard to the cable, Mr. Chartrand agreed to bury approximately 300 feet of RG-6 cable left above ground by the cable company. However, as of the date of this letter, this has not occurred.

In regard to radio reception, the staff has determined that the Wards still have interference. The WRQI interference can be heard on the following electronic equipment:

(1) a GE Super Radio (Model Number 7-2887);

(2) a JVC Boom Box (Model Number PC-W150, Serial Number 127C2502);

(3) another JVC Boom Box;

(4) a Phillips Stereo Tuner (Model Number FR910PBK02, Serial Number 16654658) in the daughter's room (dropped off on April 8, 1994).

(5) a Proton digital clock radio in the master bedroom

In an April 27, 1994 letter from Wayne and Debbie Ward, they state that they are still receiving interference on several items in their home. After WRQI's recent efforts, the Wards state they still have interference to their radios. In addition, the Wards state that considering the Commission's directions, they feel that the time spent on their problems was short and rushed by Mr. Suffa (1 hour) and Mr. Groth (10 1/2 hours). Further, they state that on April 8, 1994 Bruce Yerks returned to deliver two radios that do not work. After over four years, the Wards state that they feel the intensity of these problems were not taken seriously.

On April 12, 1994, the Commission's staff determined that WRQI could be heard on several places on the dial but did not note which stations could be heard on these frequencies when WRQI was off the air. In his subsequent

June 16, 1994[8] field visit, Mr. Viglione determined that 20 broadcast stations received interference on the following devices:[9]

(1) a GE Super Radio

(2) a JVC Boom Box (2)

(3) a Phillips Stereo Tuner

(4) a Proton digital clock radio (2)

On the GE Super Radio, Mr. Viglione observed interference on 94.5 MHz (WYYY(FM), Syracuse, NY, BMLH-841219KW or WNED(FM), Buffalo, NY, BLH-780825AD) when WRQI was on the air. Mr. Viglione notes that the interference to the affected station was eliminated when WRQI went off the air.

On both JVC Boom boxes, Mr. Viglione observed that WRQI could be received around 88, 96, 102 and 108 MHz. In addition, Mr. Viglione noted that with WRQI off the air, three additional broadcast stations could be received. These stations are as follows: 107.9 MHz(WHEN(FM), Syracuse, NY, BLH-781024AG), 106.9 MHz(WPCX(FM), Auburn, NY, BLH-880505KE) and 96.5 MHz(WCMF(FM), Rochester, NY, BLH-840501CZ).

With respect to the Phillips stereo tuner, Mr. Viglione observed interference on frequency 96.5 MHz (WCMF(FM), Rochester, NY, BLH-840501CZ). Specifically, Mr. Viglione observed that there was a mix of WRQI and WCMF, when WRQI was on the air, however, WCMF was received clearly when WRQI was off the air. In addition, Mr.p Viglione observed that the Phillips stereo tuner was desensitized[10] by WRQI's strong signal thereby causing blanketing interference to receivable broadcast stations. Mr. Viglione made a list of stations he could hear with WRQI both on and off the air. Mr. Viglione states that he could receive 17 additional FM stations between 88.1 MHz and 100.5 MHz with WRQI off the air. Mr. Viglione states that a dipole antenna fastened to the north wall of the Wards' house and oriented in the best position to null out WRQI was connected to the Phillips stereo tuner.

[8] The Commission offered WRQI an opportunity to send a representative to observe the WRQI transmitter on and off tests. Ed Lavergne states in his June 16, 1994 letter that Mr. Suffa and Mr. Groth could not attend due to scheduling conflicts. Mr. Lavergne objected to the Commission going forward with the "testing" without giving WRQI the opportunity to have Mr. Suffa or Mr. Groth in attendance. However, as Mr. Eads pointed out to Mr. Lavergne in a telephone call prior to the June 16, 1994 field visit, any observer from WRQI could have represented the station. The Commission was not engaging in any technical testing. The staff was merely listening to the complainants' radios for the presence or absence of other station's signals when WRQI was on or off the air.

[9] In making these findings, Mr. Viglione observed that there has been no change to the equipment between the staff's April 12, 1994 visit and his visit on June 16, 1994. A copy of his June 21, 1994 report is included as "Attachment 1" to this letter.

[10] Desensitization is a reduction in receiver sensitivity caused by radiofrequency overload from a nearby transmitter.

The following list indicates the frequencies that were received on the Phillips receiver between 88.1 MHz and 100.5 MHz when WRQI's transmitter was on and off:

| WRQI On the Air (MHz) | WRQI Off the Air (MHz) | Affected Broadcast Stations Receiving Blanketing Interference |
|---|---|---|
| 88.1 | 88.1 | |
| | 88.5 | WRUR(FM), Rochester, NY, BLED-1378 |
| 88.9 | 88.9 | |
| 89.9 | 89.9 | |
| 90.5 | 90.5 | |
| | 90.9 | W215AD, Lima, NY, BLFT-910614TE |
| 91.3 | 91.3 | |
| 91.5 | 91.5 | |
| 92.5 | 92.5 | |
| | 93.1 | WNTQ(FM), Syracuse, NY, BLH-7277 |
| | 93.3 | WEZO(FM), Avon, NY, BLH-930920KI |
| | 93.9 | WDNY(FM), Dansville, NY, BLH-900409KD |
| | 94.3 | WLVY(FM), Elmira, NY, BLH-851209KB |
| | 94.5 | WYYY(FM), Syracuse, NY, BMLH-841219KW or WNED(FM), Buffalo, NY, BLH-780825AD |
| | 94.7 | WPHD(FM), Tioga, PA, BLH-920408KA |
| | 94.9 | WHKS(FM), Port Allegany, PA, BLH-900718KD |
| 95.1 | | [WRQI(FM)] |
| | 95.5 | [WRQI(FM) Translator] |
| | 95.7 | WAQX(FM), Manlius, NY, BLH-880913KC or WPIG(FM), Olean, NY, BLH-4110 |
| | 95.9 | WFLR(FM), Dundee, NY, BLH-860807KB |
| | 96.3 | W242AB, Ithaca, NY, BPFT-930615TB |
| 96.5 | 96.5 | WCMF(FM), Rochester, NY, BLH-840501CZ |
| | 97.3 | WYXL(FM), Ithaca, NY, BLH-6385 |
| 97.9 | 97.9 | |
| | 98.3 | WVIN(FM), Bath, NY, BLH-840323AB |
| | 98.5 | WNYR(FM), Waterloo, NY, BLH-890426KB |
| | 99.3 | WSFW(FM), Seneca Falls, NY, BLH-4458 |
| 99.7 | 99.7 | |
| 100.5 | 100.5 | |

On the Proton digital clock radios, Mr. Viglione observed interference on 95.7(WAQX(FM), Manlius, NY, BLH-880913KC or WPIG (FM), Olean, NY, BLH-4110), 96.1 (WJYE(FM), Buffalo, NY, BLH-6053), 96.5 (WCMF(FM), Rochester, NY, BLH-840501CZ), 107.3 and 107.9 (WHEN(FM), Syracuse, NY, BLH-781024AG) MHz. Mr. Viglione notes that the interference to the affected stations was eliminated when WRQI went off the air.

In regard to telephone service, the Wards state they still receive interference on their phones. Again, static was reported as was the loss of a dial tone and callers while they are talking to them. We have determined that these problems are a Rochester Telephone Company problem and are external to her house. Further, no WRQI interference was observed to the telephones during their inspection. Again, this determination was based on the staff's observations and conversations between Mr. Viglione and Ms. Helen Payne. Ms. Payne said Rochester Telephone Company will investigate the Wards' telephone problems.

Accordingly, based on the inspection by Commission personnel, we find this complaint IS NOT RESOLVED since the Wards are still 0 receiving blanketing interference caused by WRQI. Therefore, WRQI has not fulfilled its obligation pursuant to 47 C.F.R. § 73.318.

**Muller Residence (#12)**

The Mullers indicated on Attachment "D"[11] that their electronic equipment affected by blanketing interference from WRQI are the following:

> (1) the Panasonic television (Model Number CTL-1355R, Serial Number MB92570955) located in the daughter's room;
>
> (2) the SONY television (Model Number KV-13TR27, Serial Number 8024363) located in the kitchen;
>
> (3) the RCA television (Model Number AC128W, Serial Number 839233906) located in the master bedroom;
>
> (4) the RCA television (Model Number FMR461WR, Serial Number 646200913) located in the den;
>
> (5) the JVC VCR (Model Number HR-D6104, Serial Number 15483736) located in the den;
>
> (6) the television antenna system;
>
> (7) a Phillips FR 930 Receiver/Amplifier (Model Number FR910P, Serial Number 19100064);
>
> (8) a JVC PCW 150 Boom Box (Serial Number 078C0690);
>
> (9) a Pioneer PIO AZ100 (Metal Encased Mini-Stereo, Serial Number MF3913539M2);
>
> (10) & (11)two SONY ICF-C243 clock radios.

In the final report WRQI states that in addition to the eleven items of electrical equipment listed on Attachment "D," the Mullers submitted a list of thirteen new items of electrical equipment which receive blanketing interference. The station believes that it has taken appropriate steps to resolve blanketing interference problems associated with the 11 items listed on Attachment "D" and the 13 additional items. Specifically, WRQI states the following:

> (1) To improve the Muller's television reception on all sets, Mr. Groth performed the following modifications: (a) the roof antenna and mounting tripod was replaced; (b) the rotor was replaced; (c) a Blonder Tongue MUVB splitter/amplifier was installed in the basement to replace a Radio Shack unit; (d) FM traps were installed; (e) a new low loss coaxial splitter was installed; and (f) the master bedroom television was tied into the antenna system. Although the Mullers refused to allow a defective cable connection to be replaced, television reception was improved substantially after the above modifications. WRQI states that no change was observed on any channel during on and off tests, therefore, any remaining television reception problems at the Mullers' residence are not due to blanketing interference caused by WRQI.
>
> (2) The JVC boom box, the Sony clock radio, the Realistic clock radio and the GE stereo, all located in the daughter's bedroom, were replaced with a new high quality Phillips stereo system equipped with a clock radio, dual cassette player, CD player, AM/FM radio and detachable speakers. WRQI states that the Phillips system worked properly in all respects without blanketing interference from WRQI. However, WRQI states in Footnote 16 of its report that the station could be heard on the Phillips system between 94.8 MHz and 95.3 MHz, within the skirts of the IF filters in standard FM radios, and on 87.9 MHz, below the FM band.
>
> (3) WRQI states that the station offered to replace the remaining Sony clock radio, the other Realistic clock radio and the other Sony boom box, which were located in the Mullers' master bedroom, with another Phillips stereo system identical to the one that worked in the daughter's bedroom. WRQI states that the Mullers rejected this offer. They want to use their existing equipment only.
>
> (4) In regard to telephone interference, WRQI states that, as a precaution, all telephone cords and answering machine cords were fitted with ferrite chokes. WRQI states that no blanketing interference was observed on the telephones during the April 12, 1994 site inspection.

In addition, in Exhibit 10 of the WRQI's final report, Mr. Groth states that, with regard to devices in the Muller's master bedroom,

> "1. The Sony clock radio on the night stand does exhibit blanketing interference +/- 3Mhz of 95.1Mhz. I do not feel that this is resolvable due to the fact that the unit does not have an external antenna input, and its circuits are not shielded in any way.

[11] The Commission's March 7, 1994 letter included as Attachment "D" a form which requested specific information regarding the Mullers' electronic equipment that, according to Commission record, still received blanketing interference. Attachment "D" was completed by the Mullers and returned to the Commission.

2. A Proton model RS420 was provided for this purpose, and has been modified for coaxial input. A notch filter has been added to this unit to trap out 95.1Mhz. This Proton unit operates reasonably well, however, it does pick-up WRQI +/-2 Mhz on the FM band. A number of other FM stations were able to be received on this unit."

In an April 29, 1994 letter from Thomas and Patsy Muller, they state that WRQI's representative David Groth visited them on March 29, 1994 and he worked from 9:00 am to 8:30 pm. The Mullers state that, the next day, Mr. Groth returned for an hour to try to fix their daughter's stereo speakers that go to her computer. The Mullers also state that they called Mr. Groth at his home on April 6, 1994 to tell him that the telephones were not working right. They asked his wife to have him call them when he got in that evening but he never returned the call. The Mullers state that on April 12, 1994, Mrs. Muller asked Mr. Groth why he did not call and he said that he did but no one answered. The Mullers state that they were at home on the evening of April 6, 1994, but their telephone never rang. They state that this is a frequent problem that they did not have before WRQI started broadcasting. The Mullers state that Bruce Yerks, who fixes antennas, did return on April 7 and 8, 1994. The Mullers also state that Mr. Yerks dropped off a new clock radio on April 8, 1994.

In addition, the Mullers state that, before David Groth started his work, they took him on a tour of their house and showed him all of their problems. They state that Mr. Groth told them that it would be a waste of his time to try to fix the JVC boom box because it is "beach material." The Mullers state that they told Mr. Groth that their daughter uses it as a radio and that it is always plugged into the wall rather than using batteries. The Mullers state that "[f]or the Commission's record no action was taken to fix the boom box and it still has interference on both the radio and tape deck."

The Mullers also state that they then showed him their daughter's stereo (the Phillips 930 receiver) that Mr. Pfeiffer had brought in. The Mullers state that Mr. Groth tried to fix the stereo but was not successful. Mr. Groth delivered a new stereo, another Phillips, for the daughter's room on Thursday April 7th. They state that this stereo did not work either because it played WRQI all over the FM band and on the tape player. The Mullers state that another affected device was their daughter's Sony clock radio. They state that Mr. Groth did not try to fix this radio and that it still has interference.

In regard to the Lafayette tuner in the master bedroom, the Mullers state that Mr. Groth modified the tuner, which reduced the interference but did not eliminate it. They state that WRQI still comes in on the lower part of the FM dial and when they play records. The Mullers state that the phonograph function was not tested during the FCC's April 1994 visit. The Mullers state that Mr. Groth did not attempt to repair their SONY clock radio; however, Mr. Yerks brought them a new Proton clock radio which has terrible interference.

The Mullers state that Mr. Groth tried to fix the phones but they still have interference.

The Mullers relate that Mr. Groth tried to repair their televisions by installing a new booster in the basement and some new traps. The Mullers continue that Bruce Yerks then replaced the antenna that Mr. Pfeiffer had installed and connected the remaining TV's in the house to the new antenna. As a result of this repair, the Mullers state that the picture on Channels 8, 10, and 13 is somewhat better but not the same quality that existed prior to WRQI's move. The Mullers state that Syracuse and Buffalo stations still have bad interference as opposed to the excellent reception they had before WRQI began broadcasting. According to the Mullers, Channels 21 and 31 both receive interference, which was not there prior to WRQI beginning to broadcast.

On April 12, 1994, Mr. Greenberg and Mr. Viglione inspected the Muller residence after WRQI's most recent efforts to resolve the blanketing interference. The staff observed the picture and audio quality of the RCA television located in the den. They found TASO 1 1/2 to TASO 6 reception. They observed a slight multipath bar on the left side of the screen on most of the channels which could be caused by reflections from any tower (either close by or distant). The tests also revealed that using the VCR tuner in the den yielded a slightly better picture. The staff noted that some video flutter could be caused by the RCA tuner, which was about 7 years old, or by possible overloading of the antenna system by the booster. The inspection also revealed that turning the WRQI transmitter on and off did not affect the picture quality on any channel and that WRQI was not heard over the audio portion of the television. The staff observed that although television reception is generally good in this home, there is no way to confirm whether it is as good as it was four years ago before WRQI and the tower appeared at the Oak Mount Road site. This is because their whole antenna system has been replaced and an antenna booster amplifier has been added along with filters. The staff also spot-checked the other televisions in the house to confirm that no blanketing interference existed with the WRQI transmitter on.

In regard to radio reception, the staff has determined that the Mullers still have interference. Specifically, the interference can be heard on the following electronic equipment:

(1) a JVC PCW 150 Boom Box;

(2) a Pioneer PIO AZ100 (Metal encased mini-stereo);

(3) two SONY ICFC243G clock radios (in the daughter's room and the master bedroom);

(4) a new Phillips stereo AM and tape section has no interference;

(5) a Proton radio receives interference in the master bedroom (dropped off on April 8, 1994);

(6) a Realistic clock radio;

(7) a SONY CVS-W303 Boom Box in the master bedroom.

There were three stereos (GE, Pioneer and Phillips) in the daughter's bedroom.

On April 12, 1994, the Commission's staff determined that WRQI could be heard on several places on the dial but did not note which stations could be heard on these frequencies when WRQI was off the air. In his subsequent

June 16, 1994[12] field visit, Mr. Viglione determined that 5 broadcast stations received interference on the following devices:[13]

(1) a JVC PCW Boom Box

(2) a Pioneer PIO AZ100

(3) a SONY ICFC243G clock radio

(4) a Proton radio

(5) a Realistic clock radio

(6) a SONY CVS-W303 Boom Box

On the JVC PCW Boom Box, Mr. Viglione observed that with WRQI off the air 107.9 MHz (WHEN(FM), Syracuse, NY, BLH-781024AG) could be received with no interference and when WRQI was on the air 107.9 MHz could not be received. On the Pioneer PIO AZ100 receiver, Mr. Viglione observed that with WRQI off the air 89.9 MHz (WRVO(FM), Oswego, NY, BLED-1824) could be received with no interference and when WRQI was on the air 89.9 MHz could not be received. On the SONY ICFC243G clock radio, Mr. Viglione observed that with WRQI off the air 90.5 MHz (WBER(FM), Henrietta, NY, BLED-850225KR) could be received with no interference and when WRQI was on the air 90.5 MHz could not be received. On the Proton radio, Mr. Viglione observed that with WRQI off the air 96.5 MHz (WCMF(FM), Rochester, NY, BLH-840501CZ) could be received with no interference and when WRQI was on the air the Proton radio received a mix of WCMF(FM) and WRQI. On the Realistic clock radio, Mr. Viglione observed that with WRQI off the air 88.5 MHz (WRUR(FM), Rochester, NY, BLED-1378) could be received with no interference and when WRQI was on the air 88.5 MHz could not be received. On the SONY CVS-W303 Boom Box, Mr. Viglione observed that with WRQI off the air 88.5 MHz (WRUR(FM), Rochester, NY, BLED-1378) could be received with no interference and when WRQI was on the air 88.5 MHz could not be received. In addition, Mr. Viglione also observed that the Phillips mini stereo received no harmful interference.

In regard to telephone service, the Mullers state they still receive telephone interference from WRQI. They state that occasionally they hear WRQI and static on their phones, and lose the dial tone and callers while they are talking. We have determined that these problems are a Rochester Telephone Company problem and are external to the Muller's house. Further, no WRQI interference was observed to the telephones during their inspection. Again, this determination was based on the staff's observations and conversations between Mr. Viglione and Ms. Helen Payne. Ms. Payne said Rochester Telephone Company will investigate the Mullers' telephone problems.

Accordingly, based on the inspection by Commission personnel, we find this complaint IS NOT RESOLVED since the Mullers are still receiving blanketing interference caused by WRQI. Therefore, WRQI has not fulfilled its obligation pursuant to 47 C.F.R. § 73.318.

**Other Issues**

The April 29, 1994 letter from Thomas Jay Solomon raised various issues regarding WRQI's blanketing interference. We shall now address these issues, as well as related issues raised by Mr. Suffa.

**Telephone Interference**

We note that WRQI has made attempts to remedy complaints of telephone interference. However, the interference caused by WRQI to telephones does not form a basis for determining whether WRQI has fulfilled its obligation to the complainants. 47 C.F.R. § 73.318(b) states, in pertinent part, that "[t]hese requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers. Mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers (phonographs) are also excluded." Hard-wired telephones are considered non-RF devices under § 73.318 and as such are not covered by this rule. Cordless telephones are covered by Part 15 of the Commission's rules.[14] Section 15.5(b) states, in pertinent part, that cordless telephones may not cause harmful interference and that interference to cordless telephones caused by the operation of an authorized radio station must be accepted.[15] Accordingly, the telephones referenced in this case are not covered by the blanketing interference rule, § 73.318, and have not been a basis for our decision.

**Physical Damage to the Muller's Residence**

The Commission does not have the jurisdiction or the expertise to decide whether physical damage to the Muller residence was caused by negligent wiring by WRQI-authorized personnel and, if so, who shall be held liable for monetary damages. In addition, the ends of administrative uniformity would not be advanced by Commission resolution of these issues.[16] In these respects, these issues are similar to private contractual matters, as to which it is well settled that the Commission does not involve itself, but instead leaves them for resolution by a local court of competent jurisdiction. *See Horizon Communications Corp.*, 61 FCC 2d 498, 503 (1976); *John L. Runner, Receiver (KBIF)*, 36 RR 2d 773, 778 (1976); *Trans-Continent Television Corporation (WROC-TV)*, 21 RR 945, 956 (1961) ("Commission has neither the authority nor the machinery to adjudicate" such matters). Therefore, we conclude that

[12] The Commission offered WRQI an opportunity to send a representative to observe the WRQI transmitter on and off tests. Ed Lavergne states in his June 16, 1994 letter that Mr. Suffa and Mr. Groth could not attend due to scheduling conflicts.

[13] In making these findings, Mr. Viglione observed that there has been no change to the equipment between the staff's April 12, 1994 visit and his visit on June 16, 1994.

[14] *See* § 15.3(j) for cordless telephone system definition.

[15] Cellular telephones are considered RF devices and are licensed under Part 22, Subpart K. However, this case does not involve any cellular telephone complaints.

[16] We note that the doctrine of primary jurisdiction would therefore be inapplicable to such issues. *See, e.g., Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976); *Kellerman v. MCI Telecommunications Corp.*, 493 N.E.2d 1045, 1052 (Ill. 1986); *Operator Services Providers of America* , 6 FCC Rcd 4475, 4477 (1991) ("Section 414 of the [Communications] Act preserves the availability . . . of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation").

the issues of negligence, liability, and damages are likewise beyond the Commission's jurisdiction to decide, and we shall not address those issues.

**Radiofrequency Radiation**

The Mullers are concerned about the biological effects of radiofrequency radiation on their health and on the health of their cattle. Mr. Muller stated that since 1990 he has had several unusual calf deaths and recently a calf was born dead with seven legs. There is no evidence to support the Muller ssuggestion that WRQI's facilities are exposing the Mullers or their cattle to radiofrequency radiation in excess of the current American National Standards Institute ("ANSI") standard. In addition, the staff's study, based on its theoretical application of OST Bulletin No. 65, indicates that the radiofrequency radiation level on the ground surrounding the tower is below the threshold level recommended by the ANSI. The ANSI recommendations have been adopted by the Commission for use in evaluating human exposure to radiofrequency radiation. The staff's study also shows that WRQI would be in compliance with the new more restrictive ANSI standards.[17] Further, any contention that the value of property may be diminished because of its proximity to the WRQI tower is a matter outside the Commission's jurisdiction.

**Multiple WRQI Images**

Mr. Suffa states in his *Engineering Statement* dated April 27, 1994 that "|t|he new Phillips stereo supplied by Mr. Groth tuned WRQI (95.1 MHz) between 94.8 MHz and 95.3 MHz. This is well within the skirts of the IF filters in a standard FM radio (and affects only the first adjacent channel to WRQI, which is unusable in the area under FCC protection criteria), and is not considered by this writer to constitute interference." In addition, Mr. Suffa states that "|a|lthough images of the FM station were heard at multiple places on the FM dial, this reception did not appear to affect any station received or used by residents of the household." Also, Mr. Groth states that, "|w|e believe that nearly all of the blanketing interference problems at these homes have been addressed with the exception of the clock radios, where there is adequate reception of many other stations, but some reception is lost within 2 megahertz either side of the carrier of WRQI (95.1Mhz)."

We disagree with Mr. Suffa that the new Phillips stereo received WRQI between 94.8 MHz and 95. *3* MHz. The Commission's staff observed WRQI between 94.8 MHz and 95. *4* MHz. We also take issue with Mr. Suffa's statement that the blanketing interference will affect only the first adjacent channel stations (94.9 MHz and 95.3 MHz) to WRQI. We do agree with Mr. Groth that there is blanketing interference within 2 megahertz on either side of the WRQI's carrier frequency (95.1 MHz). Specifically, Mr. Viglione observed that WRQI caused blanketing interference that affected the reception of at least 23 broadcast stations[18] on radio receivers in the complainants' homes. Accordingly, if we are to maintain the integrity of FM radio, we can not condone images appearing at multiple places on the dial that affect broadcast stations.

We note that the WRQI transmitter is operating correctly and that the blanketing interference received is strictly a function of receiver design characteristics. A receiver is considered to be blanketed[19] whenever an FM station's signal strength or signal power density is of such magnitude that it causes the receiver near the transmitting antenna to be partially or completely blocked from receiving other broadcast stations. The signal handling capability of the input stages of the affected receiver are adversely affected by the high signal levels of the blanketing station. As a result the receiver sensitivity is reduced (desensitization). The high signal level may also produce intermodulation products which may interfere with the reception of other stations. The range of the blanketing effect on the receiver can vary from slight to severe. Receivers are designed to operate in an environment consisting of desired and undesired signals. As long as the levels of the signals remain within the design specifications of the receiver, it will operate in a linear and predictable manner. If any of the signals in the environment exceed the design specifications of the receiver, the receiver will begin to operate in a nonlinear manner with unpredictable results.

47 C.F.R. § 73.318(b) states, in pertinent part, that permittees must satisfy *all* complaints of blanketing interference which are received by the station during the first year of PTA operation. WRQI has not been able to resolve all complaints of blanketing interference even after four years of PTA operation. In the *Report and Order*[20] that adopted the current blanketing rules, the Commission stated that it is our intent to have applicants place blanketing interference high on their priority lists when choosing antenna sites. We did not expect licensees to replace inexpensive, hand held radios with expensive FM tuners, but we declined to include a clause that would protect only receivers of good design. We expect permittees and licensees to meet the intent of this rule and remedy interference. The Commission, in this *Report and Order*, declined to set receiver interference rejection standards.

**Conclusion**

The Commission intends that broadcast stations take very seriously their responsibility to resolve blanketing interference. There is no reason why all such cases, if diligently attended to, should not be resolved within the first year of operation. In deciding blanketing cases, the Commission must take into account the amount of time the station has had to correct all instances of blanketing interference. In this case, WRQI has had over four years to resolve the

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[17] *See Notice of Proposed Rule Making*, ET Docket No. 93-62, adopted March 11, 1993.

[18] Mr. Viglione inadvertently turned his video camera off at 100.5 MHz.

[19] 47 C.F.R. § 73.318 states that areas adjacent to the transmitting antenna that receive a signal with a strength of 115 dBu (562 mV/m) or greater will be assumed to be blanketed. In determining the blanketed area, the 115 dBu contour is determined by calculating the inverse distance field using the effective radiated power (50 kW) of the maximum radiated lobe of the antenna without considering its vertical radiation pattern or height. Therefore, WRQI's blanketing contour area extends 2.79 kilometers (1.73 miles). Since the Mullers' home is approximately 860 meters (2821 feet) away from WRQI's transmitting antenna and the Wards' home is approximately 110 meters (360 feet) away from WRQI's transmitting antenna, both homes are blanketed by WRQI's signal.

[20] *FM Broadcast Station Blanketing Interference*, FCC 84-\$514, 57 RR 2d 126 (1984).

blanketing interference and has not done so. It is clear that they have made repeated attempts to resolve the blanketing interference. It is also clear that the complainants have had their lives disrupted over the last 4 years. Station owners, general managers, technicians and engineering consultants[21] have entered their homes on numerous occasions at the station's request. We believe that the complainants have been more than patient. The rule requires that all blanketing interference be eliminated and not simply that the station attempt to correct the problems.[22] Based on the Commissions's inspection of the complainants residences on April 11 and 12, 1994 and June 16, 1994, we find that blanketing interference has not been corrected.

Mr. Suffa states that "[i]t appears that the residents will not be satisfied until all traces of WRQI are eliminated from radio receivers that existed in the house prior to commencement of WRQI's operations, regardless of whether actual reception of desired radio stations is affected." Under the Commission's blanketing rules, the homeowners are entitled to service untainted by blanketing interference from WRQI. Since entertainment programming formats and listeners tastes can change at any time, the Commission must protect all broadcast transmissions equally whether the complainants desire to receive them or not.

The most recent work completed by WRQI's consulting team of Mr. Suffa, Mr. Groth and Mr. Yerks has been commendable. We note, however, that the record does not explain why the station did not take similar action within the first month of operation as Mr. Doyle, the former general manager and part owner of WRQI, promised in 1989 to the Zoning Board.[23]

One solution to blanketing interference is to reduce the signal strength of the offending station until the interference is removed. Normally, we would start with a 10 dB reduction in effective radiated power ("ERP"). In this case, a 10 dB reduction in WRQI's ERP to 5.0 kilowatts would require a transmitter power output ("TPO") of 2.5 kilowatts. The Harris HT-30FM transmitter (Serial Number MPS10268500002) in use by WRQI is type-accepted to go only as low as 30%[24] of the maximum rated power of 30 kilowatts or 9.0 kilowatts. Therefore, another type-accepted transmitter would be required to maintain a TPO of 2.5 kilowatts. Also, with an ERP of 5.0 kilowatts, WRQI would not cover its city of license, South Bristol Township, NY, with the required signal strength of 3.16 mV/m (70 dBu) pursuant to 47 C.F.R. § 73.315. Thus, this option is untenable.

Due to the long-standing and unresolved interference complaints, we find that the continued operation of WRQI at the Oak Mount Road PTA site is not in the public interest. WRQI(FM) may return to its presently licensed facilities (BMLH-871109KC) with the transmitter located at the end of South Hill Road in South Bristol Township. Since WRQI has a licensed translator station serving the Rochester area,[25] there will be minimal public impact if WRQI decides to return to its currently licensed site. In order to allow WRQI time to make plans and move equipment, WRQI's program test authority will continue in effect until July 29, 1994.

Accordingly, the requests made in the April 21, 1994 letter from Lawrence Roberts, Esq. and the April 29, 1994 letter from Thomas Jay Solomon, Esq. ARE HEREBY GRANTED to the extent indicated and denied in all other respects. In light of the above, for failure to comply with blanketing rule 47 C.F.R. § 73.318 and pursuant to § 73.1620(b), effective midnight Friday July 29, 1994, WRQI(FM)'s program test authority IS HEREBY REVOKED. This action is taken pursuant to 47 C.F.R. § 0.283.

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[21] In her May 12, 1994 letter, Mrs. Muller states that there have been 21 visits made by a total of 15 different persons working to resolve interference to devices other than telephones. In addition, Mrs. Muller also states that in regard to her telephone interference, there have been 31 visits made by a total of 34 persons. Likewise, in her May 10, 1994 letter, Mrs. Ward states that, "[i]n over four years, there have been over 25 people making twice as many visits to our home. The interference still exists. It was to be eliminated not reduced."

[22] *See Calvary Educational Broadcasting Network, Inc.*, 7 FCC Rcd 4040 (1992).

[23] *See* Exhibit B, Minutes of Zoning Board Meetings, included in the April 3, 1992 Reply to Response of Station Licensee to Commission Letter Dated December 13, 1991 submitted by Thomas Jay Solomon, Esq. and Lawrence Roberts, Esq. Specifically, at the October 11, 1989 Town of Bristol Zoning Board of Appeals ("ZBA") meeting, Mr. Doyle was asked whether the WRQI facilities would cause any interference? In response he stated,

> If you live between Rochester and the antenna, you might get a "ghost." I suspect that is what is happening. The Wards and the Talones may experience this. Our engineers have told us there will be no problem. We are required by the FCC to correct any problems if they do occur.

In addition, Mr. Doyle stated that, "If there were a problem with our proposal, I would have my engineers at these people's homes in 10 days to help solve the problems."

In an August 22, 1990 letter to Mr. and Mrs. Talone, Mr. Doyle stated that:

> In the resolution passed by the ZBA on November 8, 1989 very specific language was included as follows: "The holder of this permit and the owner of the tower shall use their best efforts, using state of the art technology, to resolve any interference caused by its antenna to neighbors within 1,500 feet of the tower.
>
> It is our view that the language would compel us to use our best efforts to any neighbors within 1,500 feet, regardless of when they move in.

[24] According to the Equipment Authorization Branch, Office of Engineering and Technology, FCC.

[25] WRQI's stated reason for moving north 7.2 miles to the Oak Mount Road site was to cover Rochester NY with a better signal to alleviate receiver induced third order intermodulation effects (RITOIE) around Pinnacle Hill. On October 30, 1992, WRQI was granted a license for translator Station W238AB located on Pinnacle Hill in Rochester. According to the Engineer In Charge of the Buffalo Fjeld Office, the translator station covers Rochester with a useable signal.

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Attachment 1: FOB Memo dated June 21, 1994

cc: EIC, Buffalo
Dorothy Talone
Suffa & Cavell, Inc.
David Groth
Bruce Yerks
Rochester Telephone Company
Seneca-Gorham Telephone

List of 3 complaints that remain unresolved:

Julie Marble
Debbie and Wayne Ward
Tom and Patsy Muller

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 94-129**

In the Matter of

Policies and Rules Concerning
Unauthorized Changes of Consumers'
Long Distance Carriers

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 10, 1994; Released: November 10, 1994**

**Comment Date: January 9, 1995**
**Reply Comment Date: February 8, 1995**

By the Commission:

### I. INTRODUCTION

1. The Commission, on its own motion, initiates this rule making proceeding[1] to review its policies and propose rules regarding unauthorized changes of consumers' long distance carriers, a practice commonly known as "slamming."[2] The Commission received over 1,700 complaints during Fiscal Year 1993 alleging unauthorized or unknowingly authorized changes of consumers' long distance carriers, and nearly 2,500 such complaints during Fiscal Year 1994. Although many of the complaints involve conversions resulting from telemarketing calls, a substantial number involve the use of potentially misleading or confusing letters of agency (LOAs) by interexchange carriers (IXCs).[3] An LOA is a document, signed by the customer, which states that a particular carrier has been selected as that customer's primary long distance carrier (also known as primary interexchange carrier). An LOA is also one of the four order verification procedures we require IXCs to use before submitting primary interexchange carrier (PIC) change orders generated by telemarketing calls. These change orders are then presented to local exchange carriers (LECs), on behalf of potential IXC customers.[4]

2. In light of the complaints we have received, we seek comment on rules prescribing the form and content of LOAs. Specifically, we propose rules to require that IXCs that use LOAs deliver them to consumers as documents that are separate from other promotional or inducement materials -- that is, the LOA would be on a separate piece of paper, apart from any inducement materials within the same envelope. We propose that the LOAs do no more than authorize an IXC to initiate a PIC change, and that they be saliently identified as such. We propose to prohibit the attachment of any other document to the LOA and to bar IXCs from including inducements of any kind in the LOA.[5] Further, we propose to require the language of the LOA to be clear and unambiguous and the type to be of sufficient size and readable style to be clearly legible. In addition, we seek comment on several other issues pertaining to LOAs that have come to our attention as a result of consumer complaints.

### II. BACKGROUND

3. In its *Allocation Order* and subsequent *Reconsideration Order* and *Waiver Order*,[6] the Commission set forth rules and procedures for implementing equal access[7] and presubscription[8] to an IXC.[9] The Commission's original allocation plan required IXCs to have on file an LOA signed by the customer before submitting PIC change orders to the LEC on behalf of the customer. The LOA provides evidence that the customer had selected that IXC as its carrier.[10] IXCs, however, asserted that this requirement would stifle competition. They claimed that consumers, as a practical matter, frequently would not execute the LOAs even though they agreed to change their PIC. Consequently, they would remain presubscribed to the dominant IXC. In light of these objections, the Commission modified the requirement to allow IXCs to initiate PIC changes if they had "instituted steps to obtain signed LOAs."[11] Subsequently, the Commission denied a petition filed by the Illinois Citizens Utility Board that sought the adoption of additional rules governing PIC changes.[12] The Commission concluded that the rules in place at that time

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[1] *See* 47 C.F.R. §§ 1.1, 1.411.

[2] "Slamming" means the unauthorized conversion of a customer's interexchange carrier by another interexchange carrier, interexchange resale carrier, or a subcontracted telemarketer. Cherry Communications, Inc., Consent Decree, 9 FCC Rcd 2086, 2087 (1994).

[3] A consumer changes his or her PIC by requesting the change directly from the IXC or the IXC solicits the consumer through telemarketing or direct mail.

[4] "Letters of agency" are also known as "letters of authorization," "orders for long distance service," and "customer commitments." For a discussion of the four verification procedures, *see* para. 5, *infra*.

[5] We believe that a LOA drafted to conform to the proposed rule will fit on a single sheet of paper with no attachments.

[6] Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (*Allocation Order*), *recon. denied*, 102 FCC 2d 503 (1985) (*Reconsideration Order*); Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935 (1985) (*Waiver Order*).

[7] Equal access for IXCs is that which is equal in type, quality, and price to the access to local exchange facilities provided to AT&T and its affiliates. *United States v. American Tel. & Tel.*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (*Modification of Final Judgment* or "*MFJ*"). "Equal access allows end users to access facilities of a designated [IXC] by dialing '1' only." *Allocation Order*, 101 FCC 2d at 911 (end user also has the capability to use other IXCs by dialing access codes).

[8] Presubscription is the process that enables each customer to select one primary IXC, from among several available carriers, for the customer's phone line(s). *Allocation Order*, 101 FCC 2d at 928. A customer accesses the primary IXC's services by dialing "1" only. *Id.* at 911.

[9] Pursuant to the *MFJ*, the Bell Operating Companies (BOCs) were ordered to provide equal access to their customers by September 1986, where technically feasible. *Id.* at 911.

[10] *Allocation Order*, 101 FCC 2d at 929.

[11] *Waiver Order*, 101 FCC 2d at 942.

[12] Illinois Citizens Utility Board Petition for Rule Making, Memorandum Opinion and Order, 2 FCC Rcd 1726 (1987) (*Illinois CUB Order*).

adequately protected consumers against "slamming." The Commission emphasized in that Order that consumers are not liable for the charges assessed by local exchange carriers for PIC changesthat were not authorized by the consumers. Further, the Commission reiterated that LECs are not permitted to collect any charges from a consumer for changing the consumer's PIC if the consumer denies requesting the change and neither the LEC nor the IXC can produce sufficient evidence that the consumer requested the change. In most cases, that evidence would be the LOA.[13]

4. Despite the consumer protection mechanisms provided by the Commission's rules applicable to PIC changes, the Commission continued to receive complaints that some consumers had been switched to other carriers without the consumers' permission. In January 1990, AT&T filed a petition requesting revision of the Commission's carrier selection rules. It alleged that unauthorized PIC changes had increased, causing inconvenience for consumers and forcing LECs to incur unnecessary expenses in resolving the resultant disputes.[14] AT&T concurrently filed suit against MCI Telecommunications Corporation (MCI) in Federal District Court in New Jersey, alleging that MCI had engaged in unfair telemarketing practices and unauthorized switching.[15] Subsequently, AT&T and MCI informed the Commission that they had settled their federal district court civil suits concerning their respective marketing practices, and as part of their settlement had agreed to propose that the Commission adopt certain safeguards designed to protect consumers against being switched without permission.[16]

5. In response to the AT&T/MCI petition, the Commission, in the *PIC Change NPRM* and its subsequent *PIC Verification Order* and *PIC Verification Reconsideration Order*, adopted rules and procedures for verification of long distance service telemarketing sales. Specifically, we required IXCs to institute one of four confirmation procedures before submitting PIC change orders generated by telemarketing on behalf of consumers to the LECs: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization by use of an 800 number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the change order.[17]

6. Despite the adoption of these additional consumer safeguards, the Commission continues to receive complaints from consumers who allege that their PIC selections have been changed without their permission. Many of these complaints describe apparently deceptive marketing practices in which consumers are induced to sign a form document that does not clearly advise the consumers that they are authorizing a change in their PIC. Consumers, for example, have complained that the "LOA" forms were "disguised" as contest entry forms,[18] prize claim forms, solicitations for charitable contributions[19] or checks made payable to the consumer. Such inducement checks, which consumers must sign in order to cash, typically contain a statement near the signature line purporting to authorize a PIC change. Consumers may cash the checks without intending to change their long distance carrier. The Commission has also received complaints against IXCs because of "negative option LOA" forms. These forms typically offer prizes to consumers if they return the forms and may "require" consumers to check a box at the end of the form if they do *not* want to change their long distance service. The characteristic common to all of these marketing practices is that the inducement is combined with the LOA and the inducement language is prominently displayed on the inducement/LOA form while the PIC change language is not, thus leading to consumer confusion. Consumers assert that when they enter the contests, claim the prizes, respond to the charity solicitations, or endorse the checks, they did not intend to switch their long distance carriers.

## III. DISCUSSION

### A. Proposed Rule

7. We continue to believe that the LOA is a useful and important consumer protection mechanism; we believe it necessary to amend the rules to ensure that when consumers sign a LOA, they are aware that they are authorizing a change in their long distance telephone service.[20] The requirement that IXCs must obtain LOAs for resolving disputes regarding changes in customer service was "designed to ensure that end users were afforded protection both from mistakes made by the LECs during the conversion process and from [IXC] marketing abuses."[21] Although

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[13] *Id.* 8

[14] *See generally* American Telephone and Telegraph Company, Petition for Rule Making, CC Docket No. 91-64, Notice of Proposed Rule Making, 6 FCC Rcd 1689 (1991) (*PIC Change NPRM);* Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992) (*PIC Verification Order), recon. denied,* 8 FCC Rcd 3215 (1993) (*PIC Verification Reconsideration Order).*

[15] MCI had previously filed suit against AT&T on October 10, 1989, alleging deceptive advertising practices.

[16] *PIC Verification Reconsideration Order,* 8 FCC Rcd at 3215.

[17] *See* 47 C.F.R. § 64.1100.

[18] We have received numerous complaints regarding this type of inducement/LOA form. The issuing IXC induces the consumer to sign the form by offering the consumer a chance to win such items as a Hawaiian vacation, a new car, or cash. Although the contest inducements are typically displayed prominently, the LOA language is usually printed in small-point type.

[19] LOA forms that are combined with solicitations for charities usually are also combined with other contests. Typically, consumers are asked to enter a cash drawing and are told that by signing the entry form, some percentage of their long distance bill will be donated to a "charitable organization" such as an "abused family charity," a "missing children's fund," or a "national children's charity." The Common Carrier Bureau, in 1993, issued a letter of admonition to Matrix Telecom for using a deceptive LOA to convert consumers to its long distance service. Matrix offered consumers a chance to win a cellular phone and airline tickets. Matrix also told consumers that by signing the form they were helping the "kids" in the community through a special program. Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau to Dennis Miga, Managing Partner, Matrix Telecom, 8 FCC Rcd 5512 (Com. Car. Bur. 1993).

[20] *See Illinois CUB Order,* 2 FCC Rcd at 1729; *see also Allocation Order,* 101 FCC 2d at 929.

[21] *Illinois CUB Order,* 2 FCC Rcd at 1729.

we have prescribed the minimum information that must be included in the LOA form,[22] the numerous consumer complaints concerning LOAs indicate that some carriers have abused the flexibility granted by the current rules to create LOAs that mislead consumers with respect to the nature and purpose of the documents. Such IXCs, among other things, have combined inducements with LOAs in the same document in such a way as to mislead or confuse consumers. Accordingly, we find it necessary to propose rules clearly delineating what must be included in an LOA document and, equally important, what may not be included in an LOA document. The proposed rules are intended to limit the contents of an LOA document so that its sole purpose and effect are to authorize a PIC change. The proposed restrictions should eliminate consumer confusion about the intent of the form.

8. Our previous orders on this subject guide the formulation of our proposals here. The letter of agency procedure set forth in the *Allocation Order* permits all IXCs to seek customer commitments to use their services and designate the IXC as the potential customer's primary IXC. Under that order, written commitments must be in the form of a statement signed by the customer and at a minimum must contain the following provisions: (1) the customer designates the IXC to act as the customer's agent for the presubscription process; (2) the customer understands that only one IXC may be designated as the customer's primary IXC for any one telephone number and that selection of multiple carriers will invalidate all such selections; (3) the customer understands that any primary IXC selection after the initial balloting will involve a charge to the customer; and (4) the specific telephone number(s) for which the primary IXC is being designated must be listed.[23]

9. Specifically addressing telemarketing, the Commission issued a simplified restatement of the minimum requirements for an LOA as set forth in the *Allocation Order* in the *PIC Verification Order* which provides that any LOA obtained by an IXC must be signed by the customer, explain what occurs when a PIC is changed, and confirm: (1) the customer's billing name and address and each telephone number to be covered by the PIC change order; (2) the customer's decision to make the IXC his or her PIC; and (3) the customer's understanding of the PIC change fee.[24]

10. Subsection (d) of our proposed rule[25] restates and organizes the LOA requirements of the *Allocation Order* and the *PIC Verification Order* into one standard rule. We propose that the LOA contain clear and unambiguous language that confirms: (1) the customer's billing name and address and each telephone number overed by the PIC change order; (2) the customer's decision to replace his or her current PIC with the IXC soliciting the LOA; (3) the customer's designation of the IXC to act as the customer's agent for the PIC change; (4) the customer's understanding that only one IXC may be designated as the customer's PIC; and (5) the customer's understanding that any PIC selection he or she makes may lead to a PIC change charge for the customer. In addition, we seek comment on whether we should require the phone number to be preprinted on the LOA. Although we seek comment on whether the Commission should prescribe specific language for the LOA, we believe that IXCs acting in good faith can implement these minimum guidelines without difficulty.

11. Based on our investigation of hundreds of consumer complaints concerning LOAs, we find that much of the abuse, misrepresentation, and consumer confusion occur when an inducement and an LOA are combined in the same document, often on the same piece of paper. Therefore, we propose to require the LOA to consist of a separate document -- that is, a separate piece of paper that contains no inducements. We believe that these restrictions will prohibit certain current deceptive marketing practices. Our proposed rule would, for example, prohibit the use of forms that combine LOAs with contest entry forms, checks, or other negotiable instruments. The proposed rule would also prohibit "negative option" LOAs, which require consumers to take some action to avoid having their long distance service changed.

12. We do not propose to prohibit inducements altogether because they may be proper and effective marketing devices for attracting customers to an IXC's service. We believe, however, that physically separating the LOA document from the inducement material within the same envelope will significantly reduce consumer confusion over the LOA. As long as the inducement and the formal LOA are separate, clear, and unambiguous, it appears that there should be little chance of consumer confusion. Although we are not proposing changes in this regard, we seek comment on whether inducements of any kind should be prohibited altogether and, if not, whether the Commission should prohibit inducements from being mailed in the same envelope as the LOA.

13. Further, we propose to require the text of the LOA to be clear and unambiguous and to be printed in type that is sufficiently large and of such a style to be clearly legible. We seek comment on whether we should prescribe the text of the LOA, the font, and its point size. We invite parties that support such requirements to submit specific suggestions.

**B. Other Unauthorized Conversion Issues**

14. We have also received many complaints describing other consumer problems arising from misleading LOAs. In light of those complaints, we seek comment on several other issues pertaining to LOAs, including whether LOAs should contain only the name of the carrier that directly provides the interexchange service to the customer. We recognize that there may be more than one carrier technically involved in the provision of long distance service to a consumer. For example, there may be an underlying carrier whose facilities provide the long distance capacity and a resale carrier that actually sets the rates charged to the end user consumer. In some cases, there also may be a carrier that acts as a billing and collection or marketing agent. One possible approach to this problem would be to allow an LOA to name only the IXC that is actually setting the rates, and to prohibit the inclusion of the name of any carrier providing the underlying interexchange capacity to

[22] *Allocation Order*, 101 FCC 2d at 929.
[23] *Id.*
[24] *PIC Verification Order*, 7 FCC Rcd at 1048; *see* 47 C.F.R. § 64.1100.
[25] The proposed rule is set forth in Appendix A.

the reseller. We seek comment on whether we should restrict the LOA so that only the IXC that actually sets the rates for the customer is identified in the LOA. Alternatively, we also seek comment on whether other carriers' names can be included in the LOA without misleading or confusing consumers, if their roles are clearly described.[26]

15. We also seek comment on whether business and residential customers should be treated differently with respect to our LOA requirements. Unlike the situation with residential customers, LOA forms sent to businesses might not be received and processed by the person authorized to order long distance presubscription for the business. Thus, even an LOA that is properly executed may result in an unauthorized change insofar as the person who executed the LOA had no authority to do so.

16. We also seek comment on the effect that unauthorized PIC conversions have on optional calling plans and the consumers enrolled in them. In cases of unauthorized PIC conversions, the consumer may not be aware of the change for at least one billing cycle. Often, these consumers continue to pay a flat, minimum monthly charge to their previous carrier for a discount calling plan despite the fact that they are no longer presubscribed to that carrier.[27] We seek comment on whether we should absolve these consumers of liability for any payments to optional calling plans after unauthorized conversions. Alternatively, we seek comments on the means or procedures, if any, that might be used to help consumers recoup their losses in this situation.

17. We also seek comment on whether any adjustments to long distance telephone charges should be made for consumers who are the victims of unauthorized PIC conversions. Specifically, we seek comment on whether consumers should be liable for the long distance telephone charges billed to them by the unauthorized IXC and if so, to what extent. Should consumers be liable for: (a) the total billed amount from the unauthorized IXC; (b) the amount consumers would have paid if their PIC were never changed; (c) or nothing at all?

18. We have received complaints alleging that some IXCs target non-English speaking consumers with bilingual and non-English inducements and LOAs. These consumers allege that the non-English versions of the LOA do not contain all of the text of the English versions of the LOA. As a result, material portions of the LOA are in only one language, typically English, which the non-English speaking consumers may not fully understand. We seek comment on whether we should adopt rules to govern bilingual or non-English language LOAs.[28] For example, should we require *all* parts of the LOA to be translated if *any* parts are translated? We also seek comment on whether all LOAs should be required to be captioned "An Order to Change My Long Distance Telephone Service Provider" or given some other title that is more descriptive and less technical.

19. Finally, we seek comment on how consumers have been affected by the IXC marketing practice of "encouraging" consumers who call an IXC's 800 number to switch to that IXC, even when the consumers' calls are not initiated for the purpose of changing PICs. Typically, the consumers respond to an advertisement and are just requesting information about the IXC. It may be argued that because the IXC does not initiate the call, the PIC order is not generated by telemarketing and thus the order verification protections in Section 64.1100 of our rules do not apply. We seek comment on whether an 800 number should be used only for verification purposes or whether it could be used, with proper safeguards, for verification purposes and placing initial orders. Finally, we seek comments on what those safeguards might be.

## IV. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

20. *Reason for action.* The Commission is issuing this Notice of Proposed Rule Making to protect consumers from unauthorized switching of their long distance carriers and to ensure that consumers are fully in control of their long distance service choices.

21. *Objectives.* The objective of this Notice of Proposed Rule Making is to initiate a proceeding to propose requirements and seek comments regarding unauthorized changes of consumers' long distance carriers.

22. *Legal Basis.* Sections 1, 4(i), 4(j), 201-205, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 303(r).

23. *Description, potential impact, and number of small entities affected.* The proposed rules will require that interexchange carriers separate their LOA forms from any promotional inducements. Small entities may feel some economic impact in additional printing costs due to the proposed letter of agency requirements. However, all IXCs who submit orders to LECs on behalf of customers now are required to institute steps to obtain signed LOAs from customers. Therefore, all IXCs should be incurring printing costs for LOAs with sufficient advance notice. IXCs could revise and print new LOAs when their old inventory of LOAs is exhausted.

24. *Reporting, recordkeeping, and other compliance requirements.* The proposed rules impose no reporting requirements and no new recordkeeping requirements. Carriers are currently required to obtain and retain records of customer orders.

25. *Federal rules which overlap, duplicate, or conflict with the Commission's proposal.* None.

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[26] In our rule making proceeding on operator services, we considered an analogous issue regarding "branding", which is the process by which an operator service provider audibly and distinctly identifies itself to each person who uses its operator services. There, we said that, if more than one carrier is involved with the provision of long distance service, "[w]e see no reason for prohibiting parties involved in rate-setting from deciding which party will be named in the brand. However, we prohibit parties from branding in the name of another party if rates are merely modeled on or copied from that party's rates and that party has not consented to the use of its name in the brand." *See* Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, 6 FCC Rcd 2744, 2757 (1991).

[27] These consumers may still access the previous IXC's long distance service by using the 10XXX access code, but it is unlikely that many customers intend to use an optional calling plan in this manner.

[28] We intend that our proposed rules in this proceeding apply to any bilingual or non-English LOAs.

26. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives.* None.

27. *Comments are solicited.* We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq.*

## V. EX PARTE REQUIREMENTS

28. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules.[29]

## VI. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218,226, 303(r), that a NOTICE OF PROPOSED RULE MAKING IS ISSUED, proposing the amendment of 47 C.F.R. Part 64 as set forth in the Appendix.

30. IT IS FURTHER ORDERED, that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before January 9, 1995. Reply comments should be filed no later than February 8, 1995. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Formal Complaints Branch, Enforcement Division, Common Carrier Bureau, Plaza Level, 1250 23rd Street N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Room 140, 2100 M Street N.W., Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

31. IT IS FURTHER ORDERED, that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

32. IT IS FURTHER ORDERED, that the Secretary shall mail a copy of this Notice of Proposed Rule Making to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a). The secretary shall also cause a summary of this Notice to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

Part 64 of the Commission's Rules and Regulations, Chapter I of Title 47 of the Code of Federal Regulations, is amended as follows:

33. The authority citation for Part 64 continues to read as follows:

**AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228, unless otherwise noted.**

34. Part 64, Subpart K, is amended by adding Section 64.1150 to read as follows:

**§ 64.1150 Letter of Agency Form and Content**

(a) An interexchange carrier shall obtain any necessary written authorization from a subscriber for a primary interexchange carrier change by using a letter of agency as specified in this section. Any letter of agency that does not conform with this section is invalid.

(b) The letter of agency shall be a separate document whose sole purpose is to authorize an interexchange carrier to initiate a primary interexchange carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the primary interexchange carrier change.

(c) The letter of agency shall not be combined with inducements of any kind on the same document.

(d) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

1) the subscriber's billing name and address and each telephone number to be covered by the primary interexchange carrier change order; and

2) the decision to change the primary interexchange carrier from the current interexchange carrier to the prospective interexchange carrier; and

3) that the subscriber designates the interexchange carrier to act as the subscriber's agent for the primary interexchange carrier change; and,

[29] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

4) that the subscriber understands that only one interexchange carrier may be designated as the subscriber's primary interexchange carrier for any one telephone number and that selection of multiple carriers will invalidate all such selections; and

5) that the subscriber understands that any primary interexchange carrier selection they choose may involve a charge to the subscriber for changing the subscriber's primary interexchange carrier.

(e) Letters of agency shall not purport to instruct the subscriber to take some action in order to retain the subscriber's current interexchange carrier.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 93-22**

In the Matter of

Policies and Rules Implementing
the Telephone Disclosure and Dispute
Resolution Act

**ORDER ON RECONSIDERATION**
**AND**
**FURTHER NOTICE OF PROPOSED RULE MAKING**

**Adopted: August 2, 1994; Released: August 31, 1994**

By the Commission:

**Comment Date: October 10, 1994**
**Reply Comment Date: October 31, 1994**

## I. INTRODUCTION

1. In this Order on Reconsideration and Further Notice of Proposed Rule Making, we affirm, with minor modifications, our regulations governing interstate pay-per-call[1] and similar services. Specifically, we clarify that information services excluded from the pay-per-call definition need not be offered exclusively through 900 numbers. We also require local exchange carriers (LECs) to file federal tariffs for their services enabling subscribers to block access to 900 numbers, and direct common carriers that bill subscribers for information services obtained through collect calls or presubscription arrangements to separate those charges from charges for telecommunications services. In addition, we propose to amend our regulations to give telephone subscribers greater protection from fraudulent and deceptive practices associated with the use of 800 numbers to provide information services.

## II. BACKGROUND

2. This proceeding was initiated to implement the Telephone Disclosure and Dispute Resolution Act (TDDRA).[2] The TDDRA charged both this Commission and the Federal Trade Commission (FTC) with adopting new rules to implement statutory requirements governing the provision of interstate pay-per-call and related services.[3]

3. On July 15, 1993, the Commission adopted a *Report and Order* amending our pay-per-call regulations consistent with the statutory mandate.[4] Four parties filed petitions for reconsideration of these rules. The parties participating in the reconsideration phase of this proceeding and the abbreviations used in this Order are listed in Appendix A.[5]

## III. DISCUSSION

### A. Definition of Pay-Per-Call Service

4. *Explanation of the Issue:* Section 64.1501 of the Commission's rules, 47 C.F.R. § 64.1501, establishes the scope of the Commission's pay-per-call regulations by adopting, virtually verbatim, the TDDRA's definition of the term "pay-per-call services," including the exemption of certain services or transactions from pay-per-call status.[6] Section

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[1] Pay-per-call services (also commonly known as "900 services") provide telephone users a variety of recorded and interactive information programs for which charges exceeding normal tariffed transmission rates are assessed.

[2] *The Telephone Disclosure and Dispute Resolution Act of 1992*, which added Section 228 to the *Communications Act of 1934*, Pub. L. No. 192-556, 106 Stat. 4181 (1992)(codified at 47 U.S.C. § 228).

[3] Under the statute, the Commission's regulations impose obligations and constraints on common carriers that transmit or bill for such services, while the FTC's regulations have a broader scope, controlling the activities of information providers (IPs) that produce pay-per-call programs and other entities, including common carriers, that perform pay-per-call billing and collection.

[4] *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, 8 FCC Rcd 6885 (1993) (*Report and Order*).

[5] MCI, Pilgrim, SWBT and U S West filed Petitions for Reconsideration. U S West sought deferral of the November 1, 1993 effective date for certain pay-per-call billing requirements set forth in Section 64.1510. On October 29, 1993, the Commission released an order that deferred the effective date of Sections 64.1510(a)(2)(ii), (b) until January 1, 1994, and dismissed U S West's petition as moot. *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, *Order*, 9 FCC Rcd 2475 (1993). Accordingly, that petition and responsive pleadings are not addressed herein.

[6] The rule currently defines "pay-per-call" service to be any service

> (1) In which any person provides or purports to provide
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> (i) Audio information or audio entertainment produced or packaged by such person;
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> (ii) Access to simultaneous voice conversation services; or
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> (iii) Any service, including the provision of a product, the charges for which are assessed on the basis of the completion of the call;
>
> (2) For which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to the charge for transmission of the call; and
>
> (3) Which is accessed through the use of a 900 number. The rule further provides that directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate, or any service the charge for which is tariffed, or any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of such service are not pay-per-call services.

The *Report and Order* and Code of Federal Regulations incorrectly designated this section as Section 64.1501(b)(1). As shown in Appendix B, we are correcting this error by designating the provisions as Section 64.1501(a)(4).

64.1506 of the Commission's rules, in turn, carries out the statutory imperative that the Commission designate "certain telephone number prefixes and area codes" that all interstate pay-per-call programs must use.[7] That rule requires all interstate services that meet the statutory definition of pay-per-call services to be placed on the 900 service access code. Pilgrim seeks reconsideration of the *Report and Order* on the grounds that Section 64.1506, as currently worded, does not specifically exclude from its requirements services that the TDDRA and Section 64.1501 exempt from the definition of pay-per-call services.

5. *Positions of the Parties:* Pilgrim suggests that the interplay between Sections 64.1501 and 64.1506 has the unintended result of requiring 900 numbers to be used for access to directory assistance and other information services that are expressly removed from the pay-per-call designation. Pilgrim states that such a result would be at odds with the TDDRA, other Part 64 rules, and the *Report and Order* in which those rules were adopted. Pilgrim thus asks that we amend the rules to clarify that the specific exclusions to pay-per-call status contained in Section 64.1501 be recognized in Section 64.1506.[8]

6. *Decision:* Section 64.1506 will be modified to clarify that the services specifically exempted from pay-per-call status by Section 64.1501 need not be offered exclusively on the 900 service access code. We did not intend for Section 64.1506 to negate the express exclusions from pay-per-call status enacted by Congress in the TDDRA and incorporated into our rules. Thus, we amend Section 64.1506 to require any interstate services possessing the basic pay-per-call attributes set forth in Section 64.1501(a)(1)-(2), and not subject to the exclusions stated in that section, to be offered only through telephone numbers beginning with the 900 service access code.

**B. Federal Tariffing for 900 Number Blocking Services**

7. *Explanation of the Issue:* LECs are required, where technically feasible, to offer telephone subscribers a reasonably priced, federally tariffed service by which access to 900 numbers is blocked.[9] SWBT, USTA and U S West oppose the federal tariffing requirement.

8. *Positions of the Parties:* SWBT, supported by USTA and U S West, seeks reconsideration of the federal tariffing requirement, noting that subscribers will naturally look to state tariffs to obtain 900 number blocking in conjunction with their local exchange service. Both SWBT and U S West contend that state tariffing has been effective and that mandatory federal tariffs constitute a "make work" project that will burden LECs and confuse customers without providing any benefits not already provided by a state tariffing system.[10] Moreover, SWBT questions whether ordinary residential and business end users interested in obtaining 900 number blocking would be entitled to purchase such services from the LECs' federal tariffs, which sell access services to the IXCs.[11] SWBT requests that the Commission at least permit LECs to meet the federal tariffing requirement by simply referencing state general exchange tariffs.

9. AT&T opposes SWBT's petition, contending that it simply repeats arguments that were already raised and rejected in a previous phase of this proceeding. AT&T also asserts that SWBT has failed to show that LECs are actually and substantially burdened by the federal tariffing requirement. AT&T observes that a dual federal-state tariffing system has been required for international call blocking services despite similar objections from LECs.[12]

10. *Decision:* We will retain the federal tariffing requirement for 900 blocking services. The TDDRA imposes a clear mandate that blocking services be reasonably priced and we can ensure compliance with that requirement most effectively by requiring the filing of federal tariffs. Federal tariffs assure that this Commission need not review individual state tariffs or await subscriber complaints to ensure that 900 number blocking is offered to subscribers at a reasonable charge. LECs may not satisfy the federal tariffing requirement by cross-referencing state tariffs. Under such a system the Commission would be burdened with gathering and reviewing state tariffs if problems involving 900 number blocking arise.

11. No party supporting rescission of the federal tariffing requirement has attempted to quantify the costs of compliance or presented concrete evidence that any new billing and accounting procedures or internal training programs needed to effectuate federal tariffs would be unduly costly or complex. Moreover, despite SWBT's concern, business and residential subscribers are not precluded from obtaining 900 number blocking from federal access tariffs. As AT&T notes, LECs have already chosen to include non-access services in their federal access tariffs.[13] In addition, although LECs are free to include blocking provisions in federal access tariffs, they are not required to do so. Separate tariffs setting forth the terms and conditions of 900 number blocking may be filed with the Commission if LECs so desire.

**C. Scope of Pay-Per-Call Billing Requirements**

12. *Explanation of the Issue:* Section 64.1510 of the Commission's rules, 47 C.F.R. § 64.1510, requires common carriers that include charges for pay-per-call and other information services on telephone bills to separate such charges from those associated with ordinary telecommunications services and to disclose certain information regarding consumers' rights and responsibilities. Section 64.1510(a) pertains to pay-per-call charges while Section 64.1510(b) involves information services falling outside the statutory definition of pay-per-call, *i.e.* information services provided to subscribers on a collect basis or under a presubscription or comparable arrangement.[14] Under Section 64.1510(a), carriers that assign pay-per-call numbers to

[7] 47 U.S.C. § 228(b)(5).

[8] Pilgrim Petition at 2. Although AT&T filed an opposition to Pilgrim's petition, it appears that AT&T misunderstands Pilgrim's request. The substance of AT&T's opposition actually supports Pilgrim's contention that 900 number access should not be required for directory assistance and other information services specifically excluded from pay-per-call status.

[9] 47 C.F.R. § 64.1508.

[10] SWBT Petition at 2; U S West Petition at 3.

[11] SWBT Reply at n.3.

[12] AT&T Opposition at 5-6.

[13] International call blocking is available to call aggregators under federal access tariffs.

[14] Section 64.1501(b)(1) defines presubscription as a contractual agreement in which: (1) the service provider clearly and conspicuously informs a consumer of the terms and conditions under which the service is offered, including the rates to be charged and the service provider's name, address, and business

IPs and also have contracts to bill telephone subscribers for such services must ensure that telephone bills including pay-per-call charges show the date, time, and duration of each pay-per-call transaction separately from charges for local and long distance telephone services. In addition, those carriers must include with all bills assessing pay-per-call charges notification of various consumer rights and responsibilities, including the availability of 900 number blocking and the prohibition against disconnecting telephone service for failure to pay pay-per-call charges. Section 64.1510(b) requires all common carriers billing subscribers for collect or presubscribed information services to observe the separate billing and consumer notification requirements "to the extent possible." MCI seeks reconsideration of Section 64.1510(b) as it applies to information services obtained pursuant to a presubscription or comparable arrangement.

13. *Positions of the Parties:* MCI argues that Section 64.1510(b) goes beyond the express provisions of the TDDRA. MCI claims that extending the separate billing and consumer notice requirements applicable to pay-per-call services to cover presubscribed information services is at odds with both Congressional intent to exclude credit card and other presubscribed transactions involving 800 number information services[15] from the scope of pay-per-call regulation and the Commission's own decision not to require a preamble for 800 number information services. MCI further contends that the billing requirements are not necessary to advance the public interest and, in fact, impose unwarranted burdens and costs on common carriers because they must reconfigure billing procedures and statements, possibly adding an extra page to telephone bills.

14. Sprint, USTA, and U S West support MCI's petition.[16] Sprint notes the difficulty of separating collect information services calls from ordinary collect calls and also suggests that requiring separation of charges for information services provided under a presubscription arrangement was an "afterthought," imposed without identifying the public interest to be served.[17]

15. U S West asks that we clarify the obligation of carriers to segregate collect and presubscribed information service charges from ordinary telecommunications charges because our rule only requires separation "to the extent possible." U S West appears to be concerned that it cannot differentiate between an 800 number information services call billed under a presubscription arrangement and a remote access interexchange call.[18]

16. *Decision:* We will not rescind the requirement that common carriers billing subscribers for collect or presubscribed information services separate the charges for those services from the charges for ordinary telecommunications services, to the extent possible, and include in each bill assessing such charges a brief statement of subscriber rights and responsibilities. The parties correctly observe that these provisions are not required by the TDDRA. Section 64.1510(b), however, is not inconsistent or incompatible with the statute,[19] nor does the TDDRA restrict this Commission's ancillary jurisdiction under Title I of the Communications Act to impose additional regulations to protect consumers from fraudulent and deceptive practices associated with the provision of interstate information services.[20]

17. Under the TDDRA's regulatory framework, if interstate information services are offered under certain terms and conditions, they do not invoke the full panoply of consumer protections that govern services defined as pay-per-call. By adopting regulations that extend pay-per-call provisions to cover information services not within the statutory definition, we sought to minimize the potential for abuse associated with these services and to ensure that telephone subscribers who use or are billed for information services enjoy certain basic protections, regardless of the means by which those services are provided.[21] Although the TDDRA does not require the adoption of the specific requirements contained in Section 64.1510(b), it does not preclude us from exercising our Title I ancillary jurisdiction to provide that when charges for presubscribed information are included on a subscriber's telephone bill, the bill should contain notice to consumers of their rights. If

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telephone number through which additional information may be obtained or a complaint registered; (2) the service provider agrees to notify the consumer of any future rate changes; (3) the consumer agrees to use the service on the terms and conditions disclosed by the service provider; and (4) the service provider requires the use of an identification number (PIN) or other means to prevent unauthorized access to the service by non-subscribers. Use of a credit or charge card subject to the dispute resolution procedures of the Truth in Lending Act and Fair Credit Billing Act constitutes a presubscription or comparable arrangement. 47 C.F.R. § 64.1501(c)(2).

[15] Information services charged to callers under presubscription or comparable arrangements may be offered through 800 numbers. *See* n.28, *infra*.

[16] USTA, while supporting MCI's petition, suggests that the billing requirements contained in Section 64.1510(b) apply exclusively to IXCs like MCI and not to LECs. This is incorrect. Section 64.1510(b), by its terms, applies to "any common carrier offering billing and collection services to an entity providing interstate information services pursuant to a presubscription or comparable arrangement, or for interstate tariffed collect information services." This provision includes LECs that contract directly with IPs to bill for the identified services.

[17] Sprint Comments at 3.

[18] U S West Reply at 4.

[19] The Senate committee reporting on a predecessor pay-per-call bill specifically recognized that as the information services industry evolves, new and unforeseen regulations may be necessary to promote the public interest. *See* S. Rep. No. 102-190 at 12, 102nd Cong. 1st Sess., 137 Cong. Rec. (daily ed. Oct. 16, 1991). ("The Committee intends that the FCC and FTC have adequate flexibility in defining the scope of regulations to respond to new technologies and new applications which this legislation may not have anticipated, but which the agencies may determine need regulatory safeguards in order to protect consumers or [which they may determine] do not need regulatory safeguards.")

[20] *See, e.g. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[21] Billing regulations are not the only provisions that the Commission determined should be extended to cover services outside the strict pay-per-call definition. Under our rules, common carriers may not disconnect local or long distance telephone service for failure to pay either disputed collect information services charges or charges for information services billed under a presubscription arrangement. 47 C.F.R. § 64.1507(b), (c). In addition, carriers that transmit collect or presubscribed information services must establish procedures for handling subscriber complaints regarding such services and forgive charges or make refunds when appropriate. 47 C.F.R. § 64.1511(a).

carriers choose to bill for non-common carrier services, it is essential for recipients to be able to distinguish easily and understand the charges. The billing separation and disclosure requirements prescribed in Section 64.1510(b) are intended to ensure that consumers charged for information services on telephone bills are able to recognize those charges as unrelated to ordinary local or long distance charges and to challenge them without fear that basic telephone service might be jeopardized.

18. Subscriber complaints received by the Common Carrier Bureau over the past several months confirm and highlight the need to separate presubscribed information service charges from ordinary telephone charges and to educate consumers regarding their rights and responsibilities with respect to such services. These complaints indicate that common carriers are billing subscribers for information services obtained from IPs that have failed to establish a valid presubscription agreement with the subscriber of the originating telephone line. IPs providing services in this manner apparently read the Automatic Number Identification (ANI) of the originating telephone line and immediately issue a personal identification number (PIN) to a caller without ascertaining that that individual is both the subscriber to the originating line and legally capable of entering into a contractual agreement. The subscriber to the originating line is then charged for a call to the IP on the basis of ANI and, unless the bill segregates such charges, the subscriber to the originating line may not be aware that charges for information services have been billed.

19. This practice does not establish a legitimate presubscription arrangement. Unless an IP has ascertained that the subscriber to the originating line is, in fact, the caller who agreed to purchase information services under a valid presubscription or comparable arrangement, the IP may not use ANI in order to bill charges to the originating line. The threshold requirement for a presubscription arrangement is a "contractual agreement" between a consumer and an IP, and this agreement must be established before the call for which the charge is made. As the staff has noted, a caller cannot legally establish an arrangement that binds another party -- the subscriber to the originating line -- to terms and conditions unknown to and unaccepted by that party.[22] Because the basic terms of our presubscription definition preclude any use of ANI either to establish or to provide evidence of a valid presubscription or comparable arrangement, we did not believe it was necessary to include in our rules a specific prohibition against the use of ANI in billing for 800 number information services.[23] As noted above, it is clear that billing arrangements based on ANI are insufficient to ensure that presubscribed information services charges are being properly assessed because ANI identifies the subscriber to the originating line and not the caller who seeks to establish a presubscription arrangement. Accordingly, carriers billing for presubscribed information services should ensure that charges are assessed on the basis of ANI only if the subscriber, individually, has entered into a valid presubscription agreement to be billed for such calls.

20. In addition, carriers should also render bills that accurately reflect the charges assessed. Complaints before us now indicate that telephone bills for allegedly presubscribed information services do not typically show the telephone number actually dialed, usually an 800 number. Instead, an ordinary geographic area code number, or even a directory assistance number, is displayed as the terminating telephone number. Moreover, LECs often use other confusing and misleading language on their bills, such as misidentifying the call as a calling or credit card call, or an operator-assisted call. Billing subscribers in this way is unreasonable and we caution carriers that they may face sanctions if such practices continue.[24]

21. While we do not believe that the separation of charges and consumer rights notifications required under Section 64.1510(b), by themselves, adequately address the apparent abuse and evasion of our regulations described above, these requirements are clearly necessary to ensure that subscribers are at least able to identify charges for purportedly presubscribed information services. Accordingly, we hereby decline to eliminate Section 64.1510(b). Moreover, as discussed below, we are proposing to amend that section to make billing separation and notification requirements mandatory for presubscribed information services.[25] Notwithstanding U S West's reference to a need to negotiate with other carriers and redesign billing systems, we have no quantitative or other credible evidence to suggest that the separation of these charges is an especially onerous task. LECs that choose to bill for IPs offering presubscribed information services can, in their billing contracts, require the IP to identify all such calls. IPs should be able to segregate their presubscribed traffic since PIN access is required for all calls in which information services are provided pursuant to a presubscription arrangement. Moreover, IPs should be able to identify all 800 number traffic as presubscribed since charges cannot be assessed for information transmitted during a call to an 800 number if a valid presubscription arrangement has not been established. Finally, while IPs generally appear to have abandoned collect calls as a means of providing information services, LECs should include in their billing contracts a requirement that entities on whose behalf collect calls are billed take reasonable steps to segregate any collect calls for information services.[26]

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[22] Letter from Gregory A. Weiss, Acting Chief, Enforcement Division, Common Carrier Bureau to Randal R. Collett, Executive Vice President, Association of College and University Telecommunications Administrators, 9 FCC Rcd 2819 (1994).

[23] *Report and Order*, 8 FCC Rcd at 6891 n.50. Apparently some parties have erroneously interpreted this footnote to mean that an IP may bill any information service call to the subscriber of the originating telephone. That practice is not lawful. Because charges may be imposed only pursuant to a contractual presubscription agreement with a legally competent individual, billing through ANI is permissible only for calls originated by the subscriber after that subscriber has entered into an agreement.

[24] *See* 47 U.S.C. § 503(b).

[25] See ¶ 28, *infra*. We are also proposing additional billing requirements to ensure that subscribers are not improperly charged for purportedly presubscribed information services.

[26] Although we are retaining provisions governing collect calls by IPs, it does not appear to be economically viable for IPs to place collect calls to consumers. Such calls could be billed only at the tariffed rate, and the IP would not be compensated for the calls unless it were affiliated with the carrier or received a

22. We are amending Section 64.1510(b) to remove the requirement that carriers inform subscribers billed for collect or presubscribed information services that 900 number blocking is available upon request. We agree with MCI that this fact could confuse subscribers because 900 number blocking would not block collect calls or most presubscribed services, which are typically offered through 800 numbers. In addition, we are modifying slightly the terminology used in the rule to reflect more clearly the type of calls it was designed to cover. Specifically, we delete the term "interstate tariffed collect information services" and, instead, refer to "interstate information services provided on a collect basis." To ensure consistency, we also amend Sections 64.1507(c) and 64.1511(a)[27] to incorporate this changed terminology.

## IV. FURTHER NOTICE OF PROPOSED RULE MAKING

23. The underlying purpose of both the TDDRA and the Commission's pay-per-call regulations is to protect consumers from fraudulent and abusive practices associated with information services. While the statute establishes a federal regulatory structure to advance this goal, it seeks at the same time to ensure that pay-per-call regulations do not stifle mutually beneficial business arrangements between IPs and their customers. This latter interest is evidenced by the exceptions to the statute's strict protective measures carved out for services provided under a presubscription or comparable arrangement.[28]

24. A key feature of this regulatory scheme is that all information services which meet the basic criteria of pay-per-call services must be provided on the 900 services access code, unless they are subject to a statutory exemption thereto. In implementing the requirements of the TDDRA, the Commission recognized that excluding presubscription arrangements from pay-per-call status would give IPs incentives to structure their services to fall within the exemption.[29] Our explicit definition of a presubscription or comparable arrangement[30] was intended to prevent IPs from being able instantly to "presubscribe" casual callers who had not received the basic information they would need to make informed choices or had not actually agreed to accept service on the terms offered. We specifically determined that a presubscription arrangement cannot be created during the course of a call for which information services charges are assessed, unless fees are charged to a credit or charge card.[31] While we declined to require written presubscription agreements, we noted that, in the event of a dispute, the IP would bear the burden of showing that a valid presubscription arrangement existed. We believed that this burden, along with the risk that an IP's transmission service could be terminated[32] would effectively deter false presubscription claims.

25. Our experience over the past several months has caused us to question these assumptions and to conclude tentatively that our rules should be amended to give telephone subscribers greater protection with respect to information services offered through presubscription agreements.[33] We are particularly concerned about the use of 800 numbers to provide purportedly presubscribed information services. Complaints before us indicate that many telephone subscribers' monthly telephone bills include charges for information services provided over 800 numbers when the subscriber never entered into a presubscription arrangement as defined by our rules.[34] We find the use of 800 numbers in this manner to be especially troubling because 800 numbers are widely perceived as being toll-free, a perception that Congress clearly sought to maintain in the TDDRA. Moreover, even if subscribers realize that charges may be incurred for some 800 number calls, there is no easy way for subscribers to protect themselves from such unwanted charges. The important blocking protection offered for 900 numbers is not practical for 800 numbers because it would compel subscribers to sacrifice access to toll-free 800 numbers to protect themselves from 800 number information services charges.[35]

26. LECs that bill for IPs offering presubscribed information services do so under contractual agreements with IPs. Although these agreements may require IPs to offer their services in a lawful manner, abuses are typically discovered from a pattern of subscriber complaints rather than oversight by the LECs. Satisfaction of a complaint, however,

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commission or other payment for sending the calls. This would appear to be both illegal and an effort by the carrier to evade the requirements of the TDDRA that information services be placed on the 900 service access code.Z

[27] Section 64.1507(c) prohibits disconnection of basic telephone service for failure to pay disputed charges for "interstate tariffed collect information services." Section 64.1511(a) requires that carriers transmitting such services establish procedures for handling consumer complaints and forgiving charges.

[28] Moreover, while the TDDRA generally prohibits the use of 800 numbers to provide services for which callers are assessed charges, such use is permissible when callers to an 800 line either have a preexisting agreement that authorizes assessment of charges or pay for the transaction with a credit or charge card. 47 U.S.C. § 228(c)(6). We determined that the term "preexisting agreement" should be synonymous with "presubscription or comparable arrangement." *Report and Order*, 8 FCC Rcd at 6891. In addition, Section 64.1501(c)(2) specifically recognizes a credit card transaction as a presubscribed or comparable arrangement. Thus, for uniformity and simplicity, our 800 number rule simply refers to presubscription or comparable arrangements. 47 C.F.R. § 64.1504(c).

[29] *Report and Order*, 8 FCC Rcd at 6887.

[30] See n.14, *supra*. The definition is identical to that adopted by the FTC. See 16 C.F.R. § 308.2(e).

[31] 47 C.F.R. § 64.1501(c)(2).

[32] We mistakenly identified Section 64.1503 as the basis for termination. *Report and Order*, 8 FCC Rcd at 6888. That rule, however, would not apply since it only controls services defined as pay-per-call. Nonetheless, the tariffs under which interexchange carriers (IXCs) transmit 800 number traffic permit termination when service is not used in a lawful manner. *See, e.g.* AT&T Tariff FCC No. 2, Section 2.8.4 which, effective July 28, 1994, permits immediate termination rather than after 10 days notice.

[33] See ¶ ¶ 18-20, *supra*.

[34] During the pe riod from January 1, 1994 through June 30, 1994, the Informal Complaints and Public Inquiries Branch received 2003 written complaints regarding 800 number information services. Many of these complaints assert that children have unrestricted access to adult-oriented programs.

[35] Even if 800 number blocking were deemed desirable, certain subscribers may not lawfully block such lines. Call aggregators, such as hotels and payphone owners, must maintain 800 number access to comply with our rules governing operator service providers.

does not ensure that consumer interests have been adequately served. Telephone subscribers have a right not to be billed for services provided in violation of federal law or regulation and should not have the obligation, in the first instance, of determining whether prohibited charges are present on their monthly bills.

27. We therefore conclude that we must adopt more stringent requirements to control the circumstances under which valid presubscription arrangements are created and common carriers can transmit or bill for information services covered by these arrangements. We also are concerned that IPs may seek to use 800 numbers to provide access to international or other information services which may not fall strictly within the statutory definition of pay-per-call.[36] Thus, we propose to amend our rules as explained below and set forth in Appendix C.

28. We propose to amend Section 64.1504[37] of our rules to state explicitly, as we clarified in paragraph 19, *supra*, that the section protects not only callers to 800 numbers, but also subscribers whose telephone lines may be used to place calls to 800 number information services. We also propose to amend Section 64.1504(b) to state that 800 numbers may not be used to connect callers to any information service that is not provided under a presubscription or comparable arrangement, even though such calls already may be prohibited under Section 64.1504(a). IPs and carriers would thus be prohibited explicitly from transferring callers to 800 numbers to any information service, not simply those defined as pay-per-call that are offered on 900 numbers. This prohibition on the use of 800 numbers is consistent with the statutory purposes of shielding consumers from deceptive practices and maintaining the public expectation that 800 numbers will be toll-free.

29. We also propose to modify the definition of a presubscription or comparable arrangement contained in Section 64.1501(b) to require that such arrangements be established only with a legally competent individual and executed in writing, unless charges are authorized to a credit or charge card generally accepted for the purchase of consumer goods, entertainment, travel, and lodging. This would prevent IPs from creating instant "presubscription" by immediately issuing to a caller either a PIN or a "credit" card that is billed on a monthly telephone bill and usable for purchasing information services from the particular IP. In addition, we propose to amend Section 64.1510(b) to prohibit common carriers from billing subscribers for presubscribed information services without evidence of the written agreement. The amendment would also require carriers to address bills assessing presubscribed information services charges only to the individual who entered into the presubscription agreement. Finally, carriers performing billing services for IPs would be required, without exception, to separate charges for presubscribed information services from charges for telecommunications services and to display for each information service charge: (1) the type of service and the service provider's name and business telephone number; (2) the telephone number actually called; (3) the amount of the charge; (4) the date and time of the call, and, for calls billed on a time-sensitive basis, the duration of the call.[38]

30. We recognize that these proposals would impose new burdens on both common carriers and IPs that have not engaged in the abuses described above. Nonetheless, we tentatively conclude that these burdens are outweighed by the need to protect subscribers from bills for services they neither sought nor received. Since IPs are not directly controlled by our regulations,[39] we must seek to curb abusive practices by imposing obligations on common carriers that transmit or bill their services. In light of the significant abuses occurring in information services provided over 800 numbers, we tentatively conclude that the amendments to our rules outlined above and set forth in Appendix C will reasonably and effectively protect consumers from unlawful charges.

31. We invite parties to comment on our proposals to amend Sections 64.1501(c), 64.1504, and 64.1510. We encourage parties opposing these proposals to identify and quantify, with specificity, any expected burdens and to describe alternative means of protecting consumers from deceptive practices involving information services offered under presubscription agreements, especially those using 800 numbers.[40] We urge commenters to consider whether the proposed rules adequately guard against deception and evasion by IPs, particularly when an IP and common carrier are commonly owned or have close business ties. For instance, commenters may wish to discuss whether the statutory prohibitions on the use of 800 numbers contained in Section 64.1504 should be expanded to prohibit immediate activation of "credit" or "calling" cards issued to 800 number callers.[41] We invite commenters to suggest additional regulations that will protect consumers without unduly burdening legitimate IPs and common carriers.

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[36] Some IPs offer their programs over directly-dialed international telephone numbers. These services are charged in the same way as basic telephone services, not as information services. Thus, charges are assessed at the tariffed rate applicable to all telephone calls to the particular foreign location. Because charges do not exceed the tariffed rate, international information services do not fall within the statutory definition of pay-per-call services and, consequently, are not subject to federal regulations governing pay-per-call services. In addition, because only tariffed rates are charged, common carriers may be unable to distinguish calls to international information services from any other international calls. This constraint limits the extent to which international information services can be controlled by the common carriers that, in many instances, unwittingly, transmit them.

[37] This section codifies the TDDRA's prohibitions against the use of 800 numbers to (1) initiate collect information services calls; (2) connect callers to pay-per-call services; (3) charge callers upon completion of an 800 number call or for any information conveyed during a call to an 800 number unless the caller has established a presubscription arrangement permitting assessment of charges.

[38] Because of the substantial abuses in this area, we plan to make the new billing requirements effective 30 days after publication of the final rule in the Federal Register. Carriers billing for presubscribed information service calls should anticipate the possibility that they will need to make changes to their billing systems in order to comply with that rule.

[39] See n.3, *supra*.

[40] For example, we invite parties to discuss whether IXCs should be required to obtain evidence that presubscription arrangements have been properly executed before transmitting 800 number information services, or whether all presubscribed services should be billed only to a credit card.

[41] Complaints filed with the Commission indicate that some common carriers may be offering 800 number callers telephone company calling cards which are used primarily, if not exclusively, to reach information services. Immediate activation of

## V. PROCEDURAL MATTERS

### A. Ex Parte Rules -- Non-Restricted Proceeding

32. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

### B. Regulatory Flexibility Analysis

33. *Reason for action.* The Commission is issuing this *Further Notice of Proposed Rule Making* to ensure that telephone subscribers are adequately protected from deceptive and fraudulent practices associated with the provision of information services through 800 numbers and pursuant to a presubscription or comparable arrangement.

34. *Objectives.* The objective of this *Further Notice of Proposed Rule Making* is to solicit comment on proposed rules related to the provision of information services available through 800 numbers and pursuant to a presubscription or comparable arrangement.

35. *Legal Basis.* Sections 1, 4(i), 4(j), 201-205, 218 and 228 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218 and 228.

36. *Description, potential impact, and number of small entities affected.* The proposed rules will impose specific constraints on common carriers that bill subscribers for interstate information services offered pursuant to presubscription arrangements and, indirectly, on IPs that offer such services. Some small entities may feel some economic impact due to the proposed requirement that presubscription arrangements be executed in writing.

37. *Reporting, recordkeeping, and other compliance requirements.* The proposed rules require that common carriers obtain evidence of a written presubscription arrangement prior to billing subscribers for information services provided in that manner.

38. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives.* We shall consider any alternatives suggested in comments that will afford telephone subscribers effective protection from abusive practices involving information services offered through 800 numbers and pursuant to a presubscription or comparable arrangement.

## VI. CONCLUSION

39. In this *Order on Reconsideration and Further Notice of Proposed Rule Making*, we amend our rules to clarify that those interstate information services specifically exempted from pay-per-call status need not be offered exclusively on 900 numbers. We decline to reconsider requirements that: (1) LECs file federal tariffs for their services that block subscriber access to 900 numbers; and (2) any charges for collect or presubscribed information services included on a telephone bill must be separated from charges for telecommunications services to the extent possible. We also seek comment on proposals intended to protect telephone subscribers from abusive practices associated with the provision of information services through 800 numbers and pursuant to a presubscription or comparable arrangement.

## VI. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 228, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 228, and 405, that the petitions for reconsideration filed in this proceeding ARE DENIED, except as provided in this Order.

41. IT IS FURTHER ORDERED, that Part 64 of the Communications rules, 47 C.F.R. Part 64, IS AMENDED as set forth in Appendix B, effective 30 days from publication of the text of that rule in the *Federal Register*.

42. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 228, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 228, and 405, that a *Further Notice of Proposed Rule Making* IS ISSUED, proposing amendment of 47 C.F.R. Part 64 as set forth in Appendix C.

43. IT IS FURTHER ORDERED, That pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415, 1.419, that all interested parties may file comments on the matters discussed in this *Further Notice of Proposed Rule Making* and on the proposed rules contained in Appendix C by October 10, 1994. Reply comments are due October 31, 1994. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

such cards appears to be a clear evasion of the TDDRA's apparent intent that 800 numbers not be used to provide instantaneous access to information services.

## APPENDIX A

### LIST OF COMMENTERS RECONSIDERATION PROCEEDING

**Petitions for Reconsideration**

| | |
|---|---|
| MCI Telecommunications Corporation | MCI |
| Pilgrim Telephone, Inc. | Pilgrim |
| Southwestern Bell Telephone Company | SWBT |
| U S West Communications, Inc. | U S West |

**Comments/Oppositions**

| | |
|---|---|
| American Telephone and Telegraph Company | AT&T |
| MCI | |
| Sprint Communications Company L.P. | Sprint |
| United State Telephone Association | USTA |

**Replies**

MCI
SWBT
U S West
USTA

## APPENDIX B

### RULES AMENDED

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

**AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228 unless otherwise noted.**

Subpart O--Interstate Pay-Per-Call and 800 Services

2. Section 64.1501 is revised to read as follows:

(a) *Pay-per-call service* means any service

(1) In which any person provides or purports to provide

(i) Audio information or audio entertainment produced or packaged by such person;

(ii) Access to simultaneous voice conversation services; or

(iii) Any service, including the provision of a product, the charges for which are assessed on the basis of the completion of the call;

(2) For which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and

(3) Which is accessed through use of a 900 number;

(4) Provided, however, such term does not include directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate, or any service the charge for which is tariffed, or any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of such service.

(b) *Presubscription or comparable arrangement* means a contractual agreement in which:

(1) The service provider clearly and conspicuously discloses to the consumer all material terms and conditions associated with the use of the service, including the service provider's name and address, a business telephone number which the consumer may use to obtain additional information or to register a complaint, and the rates for the service;

(2) The service provider agrees to notify the consumer of any future rate changes;

(3) The consumer agrees to use the service on the terms and conditions disclosed by the service provider; and

(4) The service provider requires the use of an identification number or other means to prevent unauthorized access to the service by nonsubscribers;

(5) Provided, however, that disclosure of a credit or charge card number, along with authorization to bill that number, made during the course of a call to an information service shall constitute a presubscription or comparable arrangement if the credit or charge card is subject to the dispute resolution procedures of the Truth in Lending Act and Fair Credit Billing Act, as amended, 15 U.S.C. 1601 *et seq.* No other action taken by a consumer during the course of a call to an information service, for which charges are assessed, can create a presubscription or comparable arrangement.

3. Section 64.1506 is revised to read as follows:

Any interstate service described in § 64.1501(a)(1)-(2), and not subject to the exclusions contained in § 64.1501(a)(4), shall be offered only through telephone numbers beginning with a 900 service access code.

4. In Section 64.1510, paragraph (b) is revised to read as follows:

* * * * *

(b) Any common carrier offering billing and collection services to an entity providing interstate information services pursuant to a presubscription or comparable arrangement, or on a collect basis, shall, to the extent possible, display the billing information in the manner described in paragraphs (a)(2)(i)(A), (B), (D) and (a)(2)(ii) of this section.

5. In Section 64.1507, the introductory text is republished and paragraph (c) is revised to read as follows:

No common carrier shall disconnect or interrupt in any manner, or order the disconnection or interruption of, a telephone subscriber's local exchange or long distances telephone service as a result of that subscriber's failure to pay:

* * * * *

(c) Charges for interstate information services provided on a collect basis which have been disputed by the subscriber.

6. In Section 64.1511, the first sentence of paragraph (a) is revised to read as follows:

(a) Any carrier assigning a telephone number to a provider of interstate pay-per-call services or providing transmission for interstate information services provided pursuant to a presubscription or comparable arrangement or on a collect basis, and providing billing and collection for such services, shall establish procedures for the handling of subscriber complaints regarding charges for those services. * * *

* * * * *

## APPENDIX C

## PROPOSED RULES

Part 64 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 64 to continues to read as follows:

**AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228 unless otherwise noted.**

Subpart O--Interstate Pay-Per-Call and 800 Services

2. In § 64.1501, the introductory text of paragraph (b) is revised, paragraphs (b)(1), (2), (3), and (4) are republished, and paragraph (b)(5) is revised to read as follows:

* * * * *

(b) *Presubscription or comparable arrangement* means a contractual agreement, executed in writing with a legally competent individual, in which

(1) The service provider clearly and conspicuously discloses to the consumer all material terms and conditions associated with the use of the service, including the service provider's name and address, a business telephone number which the consumer may use to obtain additional information or to register a complaint, and the rates for the service;

(2) The service provider agrees to notify the consumer of any future rate changes;

(3) The consumer agrees to utilize the service on the terms and conditions disclosed by the service provider; and

(4) The service provider requires use of an identification number or other means to prevent unauthorized access to the service by non-subscribers;

(5) Provided, however, that disclosure of a credit or charge card number, along with authorization to bill that number, made during the course of a call to an information service shall constitute a presubscription or comparable arrangement if the credit or charge card is both:

(i) generally available for the purchase of consumer goods, entertainment, travel, and lodging, and

(ii) subject to the dispute resolution procedures of the Truth in Lending Act and Fair Credit Billing Act, as amended, 15 U.S.C. § 1601 *et seq.*

3. In § 64.1504, the introductory text and paragraph (a) is republished and paragraphs (b), (c), and (d) are revised to read as follows:

Common carriers shall prohibit, by contract or tariff, the use of any telephone number beginning with an 800 service access code, or any other telephone number advertised or widely understood to be toll free, in a manner that would result in

(a) The calling party or the subscriber to the originating line being assessed by virtue of completing the call, a charge for the call;

(b) The calling party being connected to a pay-per-call service or any other information service that is not provided in accordance with paragraph (c) of this section;

(c) The calling party or the subscriber to the originating line being charged for information conveyed during the call except pursuant to a presubscription or comparable arrangement between the information provider and the party charged;

(d) The calling party or the subscriber to the originating line being called back collect for the provision of audio or data information services, simultaneous voice conversation services, or products.

4. In § 64.1510, paragraph (b) is revised and new paragraph (c) is added to read as follows:

* * * * *

(b) Any common carrier offering billing and collection services to an entity providing interstate information services pursuant to a presubscription or comparable arrangement shall

(1) Bill for such services only after obtaining evidence that a presubscription or comparable arrangement has been established in accordance with § 64.1501(b) with the person being billed, and address the bill to that person;

(2) In any billing that includes charges for any interstate information services provided pursuant to a presubscription or comparable arrangement (i) Include a statement indicating that:

(A) Such charges are for non-communications services;

(B) Neither local nor long distance services can be disconnected for non-payment although an information provider may employ private entities to seek to collect such charges; and

(C) Access to information services may be involuntarily blocked for failure to pay legitimate charges;

(ii) Display any charges for information services obtained pursuant to a presubscription or comparable arrangement in a part of the bill that is identified as not being related to local and long distance telephone charges; and

(iii) Specify, for each presubscribed information service charge made, the type of service; the name and business telephone number of the service provider; the amount of the charge; the telephone number actually dialed; and the date, time, and, for calls billed on a time-sensitive basis, the duration of the call.

(c) Any common carrier offering billing and collection services for interstate information services provided on a collect basis shall, to the extent possible, display billing information in the manner described in paragraph (b)(2) of this section.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

County of Leelanau, Michigan — File Nos. 267839, 269291, 269292, 273392, 790529, and 790530

Applications For Licenses in the Private Land Mobile and Operational Fixed Microwave Radio Services

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 4, 1994; Released: November 4, 1994**

By the Commission:

1. The Commission has before it an Application for Review filed jointly by the Citizens for Existing Towers (CET), Michigan Audubon Society (MAS), National Audubon Society (NAS), and the National Parks and Conservation Association (NPCA) (hereinafter collectively referred to as "CET") on January 21, 1994; an Opposition to the Application for Review filed by the County of Leelanau, Michigan (Leelanau County) on February 7, 1994; a Reply to the Opposition to the Application for Review filed by CET on February 17, 1994; a Motion to Expedite Review filed by Leelanau County on June 29, 1994; a Response to the Motion to Expedite filed by CET on July 8, 1994; and a Reply to the Response to the Motion to Expedite filed by Leelanau County on July 14, 1994.[1]

2. On December 21, 1993, the Private Radio Bureau (Bureau) issued (without a written decision) conditional permits and granted Leelanau County's six land mobile and microwave applications to update its public safety system. The proposed public safety system will consist of five existing County operated towers and the construction of a new tower at the Jurica site, which will house the radio transmitting and receiving antennae. CET opposes the construction of the Jurica tower on environmental grounds. Specifically, CET contends that the Jurica tower will be located in a migratory bird corridor and will result in the "taking" of migratory birds in violation of the Migratory Bird Treaty Act, 16 U.S.C. Section 703. Additionally, CET asserts that the Jurica tower will adversely affect the aesthetic nature of the nearby national park system, Sleeping Bear Dunes National Lakeshore (National Lakeshore). Finally, CET maintains that the Bureau failed to consider alternative sites and failed to issue a Finding of No Significant Impact, in violation of the requirements of the National Environment Policy Act (NEPA) and the Commission's rules.[2]

3. We note that prior to issuing Leelanau County's licenses, the Bureau required Leelanau County to prepare an Environmental Assessment, and supplements thereto, and reviewed the opinions of expert agencies such as the United States Fish and Wildlife Service (USFWS) and the United States Forest Service, as well as CET's submissions, regarding the impact of the Jurica tower on threatened, endangered species and migratory birds, as well as the nearby National Lakeshore. Implicit in the Bureau's grant of the licenses was its determination that Leelanau County's proposed public safety system would not likely have a significant impact on the environment. Based on our review of the record, we affirm the Bureau's grant of conditional licenses, but as discussed below impose several additional conditions. We further explicitly find that the action will not have a significant environmental impact,and thereby correct the technical defect pointed out by CET.[3]

**Need for an Updated Public Safety Communications System**

4. Leelanau County had sought authorization to update its existing public safety communications system, which utilizes eleven multiple tower sites and relies upon a low-band system with repeaters connected by leased telephone circuits and which has proven to be unreliable and expensive to operate. Leelanau County maintains that its existing system is no longer suitable because of coverage problems, and has recited a litany of critical safety problems that exemplify and demonstrate its need for an improved, effective public communications system.[4] Various public safety

[1] Leelanau County acknowledges that CET had participated in this proceeding at the licensing stage and thus has standing. However, Leelanau County argues that since MAS, NAS and NPCA only formally participated at the review stage, they now lack standing and should be dismissed in accordance with 47 C.F.R. Section 1.115(a). We will grant them standing, however, since MAS, NAS and NPCA have joined with, and raised the same arguments as CET , and dismissal based on their lack of earlier participation thus would not serve any purpose. *Cf. Office of Communication of United Church of Christ v. FCC*, 911 F.2d 803, 808-09 (D.C. Cir. 1990).

[2] *See* 42 U.S.C. Section 4332 (2)(C)(iii) and (E); 47 C.F.R. Sections 1.1308 and 1.1311(a)(4). It should be noted that CET also contends that the Bureau failed to consider the fact that the local zoning commission twice denied Leelanau County authority to build on the Jurica site, and that Leelanau County overruled the commission's decision. Given that the local zoning decisions were not provided, the Bureau could not determine that the permits were initially denied on environmental grounds. *See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, 60 RR 2d 13, 17-18 (1986); *see also Baltimore County, Maryland*, 5 FCC Rcd 5615, 5617 (1990). Although the local zoning board's decisions were advisory in nature, and not binding on the County, we have nevertheless considered herein all references to the local decisions and submissions in the record provided by all the interested parties.

[3] Pursuant to 47 C.F.R. Section 1.1308(d), the County must provide the community notice of the Commission's finding of no significant impact.

[4] For example, in April of 1993, a 9-1-1 call was received from a frantic mother whose child was choking on a coin. Due to a severe storm across the bay in Antrim County, coupled with more power output on the low band radio, the signal was diminished. By the time Suttons Bay rescue could be dispatched, the child had choked to death. In July of 1992, an individual suffered chest pains at the Suttons Bay Bank. The Bank contacted 9-1-1, but there was a low pressure area in the County at the time and the pagers would not activate on signal. The bank customer died. In May of 1993, a home and adjacent

groups, such as the Leelanau County's Sheriff Department, the Leelanau County Office of Emergency Management, the Lake Leelanau Volunteer Fire Department, the Northport Emergency Medical Services, the Glen Arbor Township Fire Rescue and the Cedar Fire Department, all have submitted comments supporting Leelanau County's proposal, recounting the daily crisis and utter chaos and emphasizing the dramatic need for an updated public safety communications system.

5. For example, the Northport Emergency Medical Services states that the current low band system suffers frequent radio failures and that dead spots are scattered throughout the county. Indeed, it points out that due to the extensive hills and valleys in Leelanau Township, there are several areas where the rescue and fire units cannot contact the base station. Likewise, the Glen Arbor Township Fire Rescue notes that reception in its area is nonexistent, with three firepersons and one rescue person unable to receive any calls. The Leelanau County Office of Emergency Management states that major fires have occurred where numerous fire departments were involved, but were unable to communicate among themselves. The Lake Leelanau Volunteer Fire Department cites to several serious problems that have been experienced by paging fire or rescue personnel.[5] The Cedar Fire Department refers to the many situations where public safety communications have failed due to storms, power outages and other causes, at times when such communications were needed most. The Cedar Fire Department also complains that during emergencies, there is often interference with excess radio traffic as the four counties attempt to share the frequency.

6. Leelanau County's proposed system would remedy the current problems by providing excellent county-wide mobile and portable coverage that could be used as a collection point for single channel radio frequency links for receivers and fire transmitters located elsewhere in the county. The main feature of the proposed system is the ability to use multiplexed microwave radios and link all of the system back to the central dispatch site at Jurica. The proposed 480 foot steel guyed Jurica tower will house radio transmitting and receiving antennae, and will be designed to hold a variety of communications antennae that could be used in the future to support other county-wide mobile systems such as road commission and local government communications. The proposed system requires line-of-site paths for radio frequency links from other subordinate sites around Leelanau County and a strong microwave path from the central Jurica site to the Leelanau County Jail in Leland, Michigan.

**Effect on Endangered Species and Migratory Birds**

7. Section 7 of the Endangered Species Act of 1973, 16 U.S.C. Section 1531, requires agencies to consult with the USFWS when proposals may jeopardize threatened or endangered species. Pursuant to the Act and the Commission's own environmental regulations,[6] the Bureau initiated formal consultation with the USFWS to assess the effects of the Jurica tower on the Piping Plover, the Bald Eagle and the Peregrine Falcon, three species identified by CET as federally listed threatened or endangered species that are in the area. As part of the consultation process, and at the recommendation of the USFWS, Leelanau County submitted extensive data on the effects of towers on the three designated species, as well as migratory birds generally, since the Jurica site is located within a migratory bird corridor. The USFWS, fully apprised of the data collected, concluded "that the proposed Commission licensing action is not likely to adversely affect the piping plover, bald eagle, or peregrine falcon," noting "that the probability of collision by these three federally listed species with the proposed tower would be insignificant," and terminating consultation.[7] The Bureau conditioned Leelanau County's authorization by requiring the County to monitor and report the loss of any threatened or endangered species, as recommended by the USFWS. The USFWS, however, did not reach any explicit finding with respect to the effect of the tower on migratory birds. CET raises no objections to the USFWS's conclusions, and recommended conditions, concerning the threatened and endangered species.

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structure were lost to fire when a fire truck/tanker at the water point had broken an axle and was unable to leave. Firemen could neither contact other units nor could they contact dispatch to report the problem. In September of 1992, a deputy of the County Sheriff's Office received severe injuries when the suspect he was arresting smashed the deputy's face with the hand cuffs the suspect was wearing and another person seized the deputy's gun and shot him through the shoulder. The deputy laid in a ditch bleeding profusely until the Tribal Police happened to pass by and attempted to page the Suttons Bay Rescue Squad, two miles from the scene. When the communications system failed, the deputy had to rely on an ambulance from another county, twenty miles from the scene. In December of 1987, a pilot and his passenger reported icing conditions and prepared for a crash landing on North Manitou Island. The Coast Guard had a helicopter in the area and immediately diverted it to the target zone of the island. Fire and rescue units were airlifted by Coast Guard helicopter to begin the search, but as each search party left the shoreline and went into the wooded area, the radios became useless. The pilot, a Michigan State police Sergeant, was found on a trail where he had covered himself with leaves and snow. The passenger, a Northern Michigan university student, was found at the water's edge. Both had frozen to death.

[5] Specifically, the Lake Leelanau Volunteer Fire Department cited the following three cases. In the first case, a strong thunderstorm knocked out the communications system, voiding all paging and dispatching of fire and rescue units. Personnel had to be contacted by telephone, with a loss of time. In the second case, a situation was reported in which phone lines were cut, making all emergency dispatch on the system unavailable for 5 hours, since the Lake Leelanau Volunteer Fire Department's system operates and relies on phone lines. During the 5 hour outage, there were 2 fire calls, one being a house fire that responding units from nearby counties had to handle, because the Lake Leelanau Volunteer Fire Department was unable to dispatch. Finally, the third case involved a heart attack call with an unconscious victim. Due to communications problems, two pages had to be sent before the volunteers arrived on the scene, just two miles from the fire station. A rescue helicopter was forced to hover for approximately ten minutes waiting for the Lake Leelanau volunteers to arrive to secure a landing area. Not only was the fire department having dispatching problems, it was also experiencing a problem with neighboring counties which were using the same frequency and causing interference.

[6] 47 C.F.R. Section 1.1308.

[7] Letter dated December 17, 1993 from Charles M. Wooley, field supervisor of the USFWS's East Lansing Field Office to W. Riley Hollingsworth, Deputy Chief of the Bureau's Licensing Division.

8. The issue thus becomes whether the Jurica tower will significantly affect the migratory bird population. CET contends that the Jurica tower will result in an annual estimated loss of 2,500 migratory birds based on a 1979 study by Richard C. Banks, an abstract of which was provided by Leelanau County.[8] CET contends that such loss constitutes a taking under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. Section 703. At the outset, as Leelanau County pointed out, the 1979 Banks analysis, which set forth the 2,500 avian mortality figure, was based on studies of towers considerably taller than the Jurica tower and located in completely different migratory flyways, and thus does not have direct bearing on the impact of Leelanau County's proposed tower.[9] Moreover, it is not clear whether the MBTA, which is primarily a "hunting" statute that prohibits the "pursuing, hunting, taking, capturing and killing" of migratory birds, would even apply to a federally authorized tower structure.[10] Nevertheless, consistent with our overall obligations to consider the impact of our authorized facilities on the environment, we will address and determine whether the proposed Jurica tower would pose a significant, adverse impact on the migratory bird population.[11] Based on our review ofthe complete record and our imposition of further conditions on Leelanau County's authorization as set forth below, we have determined that the Jurica tower will not result in a significant loss of migratory birds.

9. Based on all of the submissions furnished by both Leelanau County and CET, it appears that any appreciable danger to the migratory bird population by the proposed Jurica tower would be during periods of low visibility, when the birds become disoriented.[12] We will thus condition Leelanau County's authorization on its marking the tower and guyed lines with appropriate balls and/or streamers, which, as we have found in the past, increases the structure's visibility and thus ameliorates the impact of a tower on the migratory bird population.[13] Moreover, recent studies have indicated that bird casualties would be dramatically reduced by the utilization of red beacon flashing lighting on towers.[14] Apparently, the alternating periods of light and darkness enable the birds to adjust, become aware of their surroundings, and avoid tower structures. Accordingly, we will further condition Leelanau County's authorization on the installation of such lighting features. Finally, we will condition Leelanau County's authorization on a comprehensive monitoring requirement that will require the County to continually monitor and report to the Bureau any and all migratory bird casualties, in addition to the existing conditions regarding threatened and endangered species. We believe that the conditions thus imposed will address CET's concerns, and more importantly, will significantly ameliorate any impact of the proposed Jurica tower on the migratory bird population.[15]

**Affect on the National Lakeshore**

10. The proposed Jurica site consists of 40 acres of undeveloped land. The Jurica tower will be located 1.5 miles northeast from the northern tip of the National Lakeshore, a national park system that hosts several designated wilderness areas and is administered by the National Park Service. CET contends that the Jurica tower will infringe upon the "natural and cultural resources," adversely impact the "view shed," and interfere with the "visitor experience."[16] CET also asserts that the very presence of such a structure may preclude future wilderness designation of the Good Harbor Basin area.

11. In assessing aesthetic concerns, the Commission accords considerable weight to local planning decisions that have addressed such matters, and other expert agencies that are familiar with and responsible for overseeing and ad-

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[8] Leelanau County's Supplemental Information on Environmental Assessment, Attachment 1.

[9] Specifically, the three towers that were the subject of the Banks' study were significantly dissimilar to the Jurica proposed tower, in that the three towers were located in Florida and North Dakota and had tower heights of 1,200 feet, 1,480 feet and 673 feet respectively. Moreover, the 673 foot tower had a base elevation which was over 200 feet higher than the base elevation of Leelanau County's proposed tower, causing the tower to be almost twice the size of the proposed tower. Most notably, the studies were all conducted in different migratory flyways than the proposed. Leelanau County's Reply to CET's Response to Motion to Expedite at 4-6.

[10] *See Seattle Audubon Society v. Evans*, 952 F.2d 297, 302-03 (9th Cir.1991) (rejected the claim that federally authorized timber sales amounted to a "taking," concluding that the MBTA primarily is a hunting statute and does not apply to bird mortalities attributed to the destruction or alteration of their habitat); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1509-10 (D. Or. 1991)(found that the modification of migratory birds' habitat did not constitute a taking under the MBTA, finding that the fundamental purpose of the Act was to protect migratory birds in an "unequal contest with hunters" who commercially benefit from selling migratory bird parts); *but see Defenders of Wildlife v. Administrator, EPA*, 688 F. Supp. 1334, 1346 (D. Minn.1988)(found that the Endangered Species Act and the MBTA both are concerned with protecting certain species from a variety of harms, including the federally authorized and registered use of pesticides).

[11] *See* 47 C.F.R. Section 1.1307(c); *see also Caloosa Television Corporation*, 3 FCC Rcd 3656, 3658 (1988) (where the Commission considered the impact of a proposed tower on the area's migratory bird population).

[12] Raymond J. Adams, Jr., Director of Research of the Kalamazoo Nature Center, Letter to Stuart Hollander, February 15, 1993. Leelanau County's Supplemental Information on Environmental Assessment, Attachment 1.

[13] *See Caloosa Television Corporation*, 3 FCC Rcd at 3658.

[14] Leelanau County's Environmental Assessment, Paragraphs 2.1.2 and 6.1.3. The U.S. Forest Service, Cadillac, Michigan is currently conducting a study in which there appears to have been a drastic decline in the number of birds killed after the tower lighting modification. Leelanau County's Supplemental Information to the Environmental Assessment, Attachment 1. Indeed, even the experts relied upon by CET, acknowledged that such lighting features have been shown to reduce bird loss at towers (Raymond J. Adams, Jr., Director of Research of the Kalamazoo Nature Center, Letter to Stuart J. Hollander, February 15, 1993).

[15] In *Caloosa Television Corporation*, 3 FCC Rcd at 3658, the Commission, in consultation with the Department of Interior, imposed similar conditions on a broadcast license where the proposed tower site was situated within a migratory bird corridor, and adjacent to a wildlife sanctuary. In this connection, we also note that the conditions herein imposed are similar to the conditions recommended by the USFWS biological opinion, which analyzed the impact of tower structures on the bird population and which was furnished by Leelanau County.

[16] CET'a Application for Review at 5.

ministering this nation's natural, cultural and historic resources.[17] The National Park Service has considered Leelanau County's proposal, and has found that:

> While the proposed communications tower is taller than others located within visual distance of the . . . National Lakeshore, the impact is not anticipated to be significantly different from the other intrusions already impacting the viewshed [sic]. For example, the developments at Sugar Loaf Mountain and at the Homestead Resort, the major electrical power lines cutting across the Miller Hill ridge, the FAA radar dome at Empire, etc.[18]

The National Park Service concluded, by stating that it did not "anticipate any direct impacts to the natural or cultural resourceswithin the boundaries of the . . . National Lakeshore" and "strongly" supporting Leelanau County's proposal, which represents an "equitable solution that will resolve the [County's] communications problems.[19] We note that CET did not support or document its claim that the tower would adversely affect the National Lakeshore, and did not provide any evidence to refute the National Park Service's finding of no impact. We thus accord due deference to the National Park Service's findings and conclude on the record before us that the Jurica tower will not have a significant, adverse impact on the National Lakeshore. We further find that there is no record evidence to support CET's speculative assertions that the erection of the Jurica tower will have a detrimental effect on, or preclude, any future wildlife or wilderness designations.

### Consideration of Alternative Sites

12. The study of alternative sites and systems, while critical to an adequate assessment of the particular proposal under consideration, need not be exhaustive or exacting, only a reasonable choice of alternatives is required.[20] Contrary to CET's assertions that alternative sites were not addressed, the alternative site analysis was reasonable and reflected a detailed consideration of alternative sites and systems.[21] Moreover, as discussed below, the alternative site analysis demonstrated that the alternative systems and sites were not selected due to either infeasibility or unavailability.

13. The County initially had considered a proposal to utilize and upgrade its eleven existing sites, the proposal most favored by CET. However, such a proposal would not have corrected many of the operational problems associated with Leelanau County's current multiple transmitters. Most importantly, such a proposal would necessitate a zoned system for police operations which would require police officers to change channels on the radios to stay in touch with the dispatcher -- a method considered to be both cumbersome and unsafe. Moreover, the existing towers would have to be replaced with much taller structures and additional relay sites would be needed to support the microwave radio operations, at great expense to the County.

14. Given the constraints of updating and utilizing the current system, the alternative site analysis examined proposals based on the construction of a central tower site, supported by several existing tower sites. Specifically, the alternative site analysis considered an already existing Leelanau County site, known as Maple City, as a potential central tower site. That site proved not to be a viable option, because the County was unable to acquire the additional land that would have been necessary to accommodate the taller, replacement tower and its supporting guy wires. The alternative site analysis also considered the possibility of utilizing the tower located at, and leased by, Central Michigan University, as central tower site. However, the alternative analysis points out that concerns were raised as to whether the University tower could support additional microwave dish antennae, and more importantly, whether the public safety communication system could afford to hinge on a lease that is subject to periodic renewal and possible future termination. The alternative site analysis further considered as a possible central tower site an area located on land owned by the County's Road Commission, known as the "gravel pit" site. The gravel pit site was subject to zoning restrictions, however, and an attempt to have the property rezoned failed.

15. Based on the alternative site analysis, we believe that Jurica site represents the best, most viable option for the location of a central tower site. In contrast to the other alternatives considered, the Jurica site, which has been acquired by Leelanau County, meets all the technical requirements for the central tower site proposal, in that it: 1) is centrally located in Leelanau County; 2) has enough acreage to accommodate the tower and supporting guy wires; 3) is at least 900 feet above mean sea level; and 4) it is also properly zoned. We further believe that the proposed system design, which utilizes the Jurica central tower site and four existing tower sites, will best achieve Leelanau County's objectives.

### Conclusion

16. We affirm the Bureau's conditional grants issued to Leelanau County on December 21, 1993. As discussed in para. 9, we will further condition Leelanau County's grants. We find that the imposition of such conditions will ameliorate any impact the Jurica tower might have on the migratory bird population, and that the tower thus will not significantly impact the environment. We also find that the Jurica tower will not significantly affect the National Lakeshore. Finally, we find that grant of Leelanau County's

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[17] *See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, 60 RR 2d 13, 17-18 (1986); *see also Baltimore County, Maryland*, 5 FCC Rcd 5615, 5617 (1990).

[18] National Park Service/Sleeping Bear Dunes National Lakeshore Letter to Great Lakes Environmental Center, May 10, 1993.

[19] *Id.*

[20] *See* 42 U.S.C. Section 4332(2)(C)(iii) and (E); *see also Vermont Yankee Nuclear Power Corp. V NRDC*, 435 U.S. 519, 551 (1978) (the study of alternatives in an environmental analysis "must be bound by some notion of feasibility"); *Seacoast Anti-Pollution League v NRDC*, 598 F.2d 1221, 1228-29 (1st Cir. 1979)(an environmental analysis of alternatives is dictated by a standard of reason"); *Baltimore County, Maryland*, 5 FCC Rcd 5615, 5617 (1990) (the study of a reasonable choice of alternatives satisfies NEPA requirements).

[21] Leelanau County's Environmental Assessment at Section 5.2.

applications will serve the public interest, convenience and necessity by enabling it to provide a necessary reliable and effective public communications system necessary to protect and safeguard the County's citizens, as well as the National Lakeshore's visitors.

17. Accordingly, IT IS ORDERED THAT CET's Application for Review IS DENIED, and that the Bureau's grant of Leelanau County's six land mobile and microwave applications IS AFFIRMED. WE FURTHER ORDER that Leelanau County's authorizations will be subject to the additional following conditions:

1. The licensee shall conduct monitoring at the Jurica site on a regular basis to evaluate the impact of the tower structure and supporting guy wires on the migratory bird population. The licensee shall record any losses or other casualties of migratory birds on an annual basis to the Private Radio Bureau.

2. The licensee shall utilize strobe red beacon lightning and install other appropriate markings such as balls and/ or streamers, at the Jurica tower for the protection of the migratory bird population.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GN Docket No. 94-96**

In the Matter of

Inquiry into alleged abuses of the Commission's auction processes by applicants for licenses in the Interactive Video and Data Services

**ORDER**

**Adopted: August 25, 1994** **Released: August 30, 1994**

By the Commission:

1. On July 28 and 29, 1994, the Commission conducted auctions for the award of 594 licenses in the Interactive Video and Data Service ("IVDS"). In promulgating rules for the award of these licenses, the Commission adopted special measures to create opportunities for small businesses and businesses owned by minorities and women to participate in the provision of IVDS.[1] The Commission adopted these measures to fulfill its Congressional mandate to promote the wide dissemination of licenses awarded by auction (47 U.S.C. § 309(j)(3)(B)), and, in particular, to ensure that small businesses and businesses owned by minorities and women have opportunities to participate in the provision of certain spectrum-based services (47 U.S.C. § 309(j)(4)(D)).[2]

2. In adopting rules to govern the IVDS auctions, the Commission announced that it would be vigilant to ensure the integrity of the auction process and to prevent abuses of the auction rules, particularly those measures adopted to provide opportunities for small businesses and businesses owned by minorities and women.[3] The Commission warned that "if an applicant for designated entity status proves unqualified, and the Commission determines that the application for designated entity status involved willful misrepresentation or other serious misconduct, the Commission will impose severe penalties. These may include monetary forfeitures, revocation of licenses, and prohibition of participation in future auctions."[4] The Commission announced that it would conduct audits of participants in the auctions to monitor conduct by applicants and to foster compliance with the auction rules.[5]

3. The Commission also determined that "it is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on a balance due."[6] The Commission concluded that penalties for payment defaults would deter speculative bidding, thereby protecting the auction process and expediting service to the public. Accordingly, the Commission's rules provide that winning bidders who default in making a down payment may forfeit their upfront payments and may be assessed additional monetary penalties.[7] The Commission further determined that "if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may also declare the applicant and its principals ineligible to bid in future auctions, and may take other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant."[8]

4. It has come to the Commission's attention that one or more bidders in the recent IVDS auctions may have misrepresented their status as designated entities, in violation of the Commission's rules. In addition, one or more winning bidders may have failed timely to tender their down payments under circumstances which may involve gross misconduct, misrepresentation or bad faith. Moreover, one or more bidders may have encouraged other winning bidders to default in making down payments in an apparent attempt to undermine and abuse the Commission's auction processes.

5. In view of the foregoing, the Commission believes that it is in the public interest to initiate an investigation of the conduct of applicants in the IVDS auctions conducted July 28 and 29, 1994, to determine whether such misconduct has occurred. The investigation shall be conducted pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. § 403.

6. ACCORDINGLY, IT IS ORDERED, that, pursuant to Section 5(c)(1) of the Communications Act of 1934, as amended, for the purpose of this inquiry authority is hereby delegated to the Chief Administrative Law Judge of the Commission to require by subpoena the production of books, papers, correspondence, memoranda and other records deemed relevant to this inquiry; to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence; and to perform such other duties in connection therewith as may be necessary or appropriate to the compilation of a complete record concerning the subject matter of this inquiry.

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[1] *Fourth Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) (petitions for reconsideration pending) (*"Fourth Report and Order"*).

[2] Small businesses and businesses owned by minorities and women are among the categories of companies referred to as "designated entities." *See Fourth Report and Order, supra*, at ¶ ¶ 34-54.

[3] *See Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2397 ¶ 278 (1994) (*"Second Report and Order"*).

[4] *Second Memorandum Opinion and Order* in PP Docket No. 93-253, FCC 94-215, released August 15, 1994, at ¶ 136; *see also Second Report and Order, supra*, at ¶ 198, *Fourth Report and Order, supra*, at ¶ 28.

[5] *Second Report and Order, supra*, at ¶ 259.

[6] *Second Report and Order, supra*, at ¶ 197; *Fourth Report and Order, supra*, at ¶ 28.

[7] *Second Report and Order, supra*, at ¶ 197; *Fourth Report and Order, supra*, at ¶ 29.

[8] *Second Report and Order, supra*, at ¶ 198; *Fourth Report and Order, supra*, at ¶ 28.

7. IT IS FURTHER ORDERED, that the Chief Administrative Law Judge is specifically authorized to designate a Commission Administrative Law Judge to exercise the authority conferred by this Order, and to require witnesses to testify and produce evidence under authority of, and in the manner provided in, Section 409 of the Communications Act of 1934, as amended, when requested to do so by Commission Counsel.

8. IT IS FURTHER ORDERED, that the subpoena power delegated by the Order shall be exercised in accordance with Sections 1.331 through 1.340 of the Commission's Rules. Motions to quash or limit subpoena shall be directed to the presiding Administrative Law Judge in accordance with Section 1.334 of the Rules.

9. IT IS FURTHER ORDERED, that the provisions of Section 1.27 of the Commission's Rules shall apply to the production of oral and documentary evidence under subpoena.

10. IT IS FURTHER ORDERED, that the investigation conducted pursuant to 47 U.S.C. § 403 shall be non-public and the investigatory record shall be kept non-public until the Commission shall order otherwise.

11. IT IS FURTHER ORDERED, that the presiding Administrative Law Judge may convene sessions at such places as may be deemed necessary for the further conduct of this inquiry.

12. IT IS FURTHER ORDERED, that the presiding Administrative Law Judge is directed to complete the investigation as expeditiously as possible so that a final report can be promptly submitted to the Commission for such further action as the Commission may deem appropriate.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GEN Docket No. 90-314**

In the Matter of

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| Amendment of the Commission's Rules to Establish New Personal Communications Services | RM-7140, RM-7175, RM-7618 |

**THIRD MEMORANDUM OPINION AND ORDER**

**Adopted: October 19, 1994; Released: October 19, 1994**

By the Commission:

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. By this order we amend in minor respects our broadband Personal Communications Services ("PCS") regulatory structure to better achieve the four primary goals of this proceeding: competitive delivery, a diverse array of services, rapid deployment, and wide-area coverage. We take this action in response to ten petitions for reconsideration or clarification of the policies and rules we adopted in a June 1994 *Memorandum Opinion and Order* in this proceeding.[1] We first summarize the petitions and our disposition of them.

2. Comcast Corporation ("Comcast") and the Cellular Telecommunications Industry Association ("CTIA") ask us to alter rules that determine the extent to which entities holding substantial ownership interests in cellular licenses also may hold 30 MHz PCS licenses in overlapping cellular and PCS service areas. We deny these petitions. Our goals for PCS reflect a balance of numerous considerations, including affirmatively promoting competition as well as preventing anticompetitive behavior in the auction process and the PCS marketplace. The petitioners offer no persuasive rationale for changing our rules to reflect a different balance. The record persuades us, however, to modify those rules in one respect. We will permit entities with attributable, but non-controlling cellular interests to bid on in-market 30 MHz PCS licenses, subject to post-auction divestiture of their non-compliant cellular interest in order to remain in compliance with our cellular/PCS cross-ownership rules. This modification furthers our policy of maximizing opportunities for cellular participation in PCS while safeguarding the PCS market and the auction process against the potential for anticompetitive conduct.

3. The Personal Communications Industry Association ("PCIA") requests that we adopt rules requiring PCS licensees to share the cost of relocating microwave licensees operating in the 1850-1990 MHz PCS bands. PCIA's cost sharing proposal is incomplete, and we believe that its adoption might hamper potential bidders' efforts to value spectrum accurately as well as generate litigation before this Commission to resolve ambiguous aspects. Further, we believe a more complete record is necessary for us to fully evaluate the costs and benefits of the proposal and to consider additional, related aspects. For these reasons we deny PCIA's petition without prejudice. PCIA or other interested parties may submit a separate petition for rulemaking to address this subject if they desire to do so.

4. Point Communications Company ("Point") requests that PCS service areas be based on Department of Commerce BEA Economic Areas" ("BEAs"), rather than Major Trading Areas ("MTAs") and Basic Trading Areas ("BTAs"). Point also requests that entrepreneur block spectrum be varied from market to market and that we make all PCS licensees subject to Open Network Architecture ("ONA") regulation. We deny these requests. The record provides no persuasive basis for concluding that greater public interest benefits will result from switching PCS service areas from MTAs/BTAs to BEAs. Point's claim that varying entrepreneur block spectrum will benefit small entities by forcing large PCS providers to develop technologies and equipment for all bands also is unpersuasive. Adopting Point's proposal likely will harm licensees by making the PCS market unnecessarily complex from technical and operational standpoints. Finally, whether ONA regulation is appropriate for the PCS marketplace is outside the scope of this proceeding.

5. The Puerto Rico Telephone Company ("PRTC") requests that we reverse our decision to establish two separate BTAs in Puerto Rico. The record does not convince us that Puerto Rico is a single economic unit, as PRTC claims, and

[1] *See Memorandum Opinion and Order*, FCC 94-144, June 13, 1994, *summarized* 59 FR 32820 (June 24, 1994); *Erratum*, GEN Docket No. 90-314, Mimeo Number 44006 (released July 22, 1994) (hereafter jointly *Broadband PCS Reconsideration*). Appendix B lists parties that filed petitions for reconsideration, oppositions or comments, and replies.

we deny its petition. We note that this decision does not preclude a party from aggregating the two Puerto Rico BTAs into a single service area.

6. The Association of Independent Designated Entities ("AIDE") requests that we clarify PCS licensees' rights to use of the terms MTA and BTA, which are subject to copyrights held by Rand McNally. In particular, AIDE asks that we determine whether the substance of certain correspondence between AIDE and Rand McNally regarding the use of those terms, which was entered into the record of this proceeding by AIDE, comports with our decision to employ the terms to denote PCS service areas. In effect, AIDE asks us to render an adjudicatory-type advisory opinion about the meaning of a licensing agreement between Rand McNally and other commercial interests regarding the use of MTA/BTA terminology. We decline to address this issue. It is our practice not to render such opinions, particularly in rulemaking proceedings, and the record provides no basis for departing from that practice here.

7. Spatial Communications, Inc. and ArrayComm, Inc. (jointly "SCI/ArrayComm"), and Omnipoint Corporation ("Omnipoint") seek changes to and clarification of various technical PCS rules. SCI/ArrayComm's understanding that base station transmitter output power limits apply to each individual antenna comports with our interpretation, and we grant its petition to that extent. We deny without prejudice SCI/ArrayComm's request to express limits on transmitted power in terms different from those in our existing rules because that request is not sufficiently developed to allow consideration of all its implications. We also deny Omnipoint's request to modify the emission mask for the licensed bands, employing a mask similar to that used for unlicensed isochronous PCS devices. Adoption of this mask could result in greatly increased out-of-band emissions levels in the adjacent frequency blocks to the detriment of the license holder in those bands. We are, however, amending the rules to specify a new measurement procedure in the 1 MHz frequency blocks immediately adjacent to, and outside of, the licensee's frequency block. This new procedure permits the use of a measurement resolution bandwidth of 1 percent, or greater, of the emission bandwidth of the device under test. We are adopting Omnipoint's request to permit a frame period of 20 milliseconds in the unlicensed isochronous sub-band. However, we are not adopting their request to require all devices operating in that sub-band to use a listen before talk monitoring interval of 20 milliseconds.

8. A coalition of broadcast interests (hereinafter "MSTV")[2] requests that we impose special operating requirements on PCS licensees operating in Block C, in order to protect adjacent channel broadcast auxiliary service ("BAS") receiver sites. This block is reserved for designated entities. We deny this request because existing rules are adequate to safeguard such operations.

9. Cellsat, Inc. ("Cellsat") asks that PCS Blocks F and C (1970-1990 MHz) be allocated domestically for Mobile Satellite Service ("MSS") on a secondary basis, and that the 2160-2180 MHz band be allocated domestically for MSS on a primary basis, in order to create an opportunity for hybrid terrestrial-satellite operations on those frequencies. We deny Cellsat's request because our MSS proceeding is a more appropriate forum to consider these issues.[3]

## II. BACKGROUND

10. On June 9, 1994, in response to 67 petitions for reconsideration of the *Second Report and Order* in this proceeding,[4] we adopted the *Broadband PCS Reconsideration* decision that allocated 120 MHz for licensed broadband PCS and 20 MHz for unlicensed PCS devices in the 1850-1990 MHz band and provided service rules for the operation of this service and equipment.[5] We revised the allocation plan to significantly lower equipment costs, lower the cost of relocating incumbent users, simplify spectrum aggregation, and preserve spectrum for worldwide MSS operations.[6] We also adopted a band plan that provides for three 30 MHz licenses (Blocks A, B, and C) and three 10 MHz licenses (Blocks D, E, and F), all of which are within the 1850-1990 MHz band. We provided that the A and B Blocks be licensed within 51 service areas based on the Major Trading Areas (MTAs) and that the C, D, E, and F Blocks be licensed within 493 smaller service areas based on the Basic Trading Areas (BTAs) set forth in the 1992 Rand McNally *Commercial Atlas & Marketing Guide*.[7]

11. We reduced the allocation for unlicensed PCS devices to 20 MHz at 1910-1930 MHz, but committed to initiating a proceeding in the near future to examine allocation of additional spectrum for unlicensed PCS operations. Within this band, we adopted a 1.25 MHz channelization scheme for isochronous (voice) devices and eliminated channelization requirements for asynchronous (data) devices.

12. Additionally, we continued to permit all eligible entities to acquire PCS spectrum up to a cap of 40 MHz. We retained our five percent equity attribution threshold for PCS licenses, so that the same entity may not own more than five percent of PCS licenses holding more than 40 MHz within the same area. We also retained our cellular attribution threshold of 20 percent equity ownership of a cellular licensee and our service area overlap test of 10 percent of the population of the relevant PCS market, so that the same entity generally may not own more than 20 percent of the cellular license and more than 5 percent of PCS license(s) that would place the entity above the spectrum limit in an overlapping service area. We relaxed the eligibility rules to permit entities with attributable interests in cellular companies whose combined cellular geographic service areas (CGSAs) overlap between 10 and 20 percent

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[2] The parties to this petition for reconsideration are: Maximum Service Television, Inc., Capital Cities/ABC, Inc., CBS Inc., Fox Inc. & Fox Broadcasting Stations, Inc., the National Association of Broadcasters, Inc., National Broadcasting Company, Inc., Public Broadcasting Service, the Radio-Television News Directors Association, and the Society of Broadcast Engineers.

[3] *See Broadband PCS Reconsideration, supra* n.1 at para. 97.

[4] *Second Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd 7700 (1993) (hereafter *PCS Second Report and Order*).

[5] *See Broadband PCS Reconsideration, supra* n.1. Previously in this proceeding we adopted: *Notice of Inquiry*, 5 FCC Rcd 3995 (1990); *Policy Statement and Order*, 6 FCC Rcd 6601 (1991); *Notice of Proposed Rule Making and Tentative Decision*, 7 FCC Rcd 5676 (1992); *Erratum*, 7 FCC Rcd 5779 (1992); *Second Report and Order*, 8 FCC Rcd 7700 (1993).

[6] *See PCS Reconsideration Order* at para. 27.

[7] *See id.* at para. 75.

of the PCS service area population to submit bids for more than 10 MHz of PCS spectrum provided that, prior to the auction, they commit to divest themselves of sufficient cellular interests to come into compliance with our eligibility rules within 90 days of license grant.

13. We provided that stock, partnership and other financial interests and relationships will be considered in determining attributable interests for purposes of our PCS spectrum caps. We raised from a 20 percent to a 40 percent non-controlling interest the threshold for determining attributable cellular equity ownership for rural telephone companies, small businesses, and businesses owned by minorities and women, which collectively are termed "designated entities" in our rules implementing 47 U.S.C. § 309(j). We increased from a 20 percent to a 40 percent non-controlling interest the threshold for determining attributable cellular equity ownership to allow non-designated entities to make non-controlling investments in PCS licenses owned and controlled by minority- and women-owned businesses. We permitted entities with attributable cellular interests covering 10 or more percent of the population in a PCS service area to acquire 10 MHz of PCS spectrum within the PCS service area and, after January 1, 2000, to acquire an additional 5 MHz for a total of 15 MHz of PCS spectrum in their cellular service areas. We pledged to examine management contracts and spectrum leases in the CMRS docket for the purpose of determining whether other interests in PCS licenses should be limited in order to foster vigorous competition.

14. Further, we relaxed construction requirements to provide that (a) 30 MHz broadband PCS licensees must provide coverage to one-third of their service area population within five years of initial licensing and two-thirds within ten years and (b) 10 MHz licensees must provide coverage to twenty five percent of their service area population within five years of initial licensing, or submit a showing of equivalent or substantial service. We increased the maximum power level permitted for broadband PCS base stations to 1640 watts equivalent isotropically radiated power (e.i.r.p.), which is equivalent to 1000 watts effective radiated power (e.r.p.). We retained with minor amendment rules ensuring compliance with minimum standards for exposure to radio frequency (RF) energy emitted by PCS devices. We committed to initiate a proceeding in the near future to allocate additional spectrum for MSS and to work toward having additional spectrum allocated to MSS at the World Radio Conference to be held in 1995 (WRC-95).

15. Previously, we adopted a *Second Report and Order* in the regulatory treatment of mobile services proceeding that concluded, *inter alia*, that broadband PCS is presumptively a commercial mobile radio service (CMRS).[8] In the emerging technologies proceeding we also adopted rules that subject all incumbent facilities in the 1850-1990, 2110-2150, and 2160-2200 MHz bands to mandatory relocation if an emerging technology provider, *e.g.*, a PCS licensee, requires the spectrum.[9]

16. Subsequent to adopting the *MO&O*, we adopted a *Fifth Report and Order* in the competitive bidding proceeding that establishes the service specific rules for selecting broadband PCS[10] licensees and adopted a *Further Order on Reconsideration* in the instant proceeding that amended our PCS attribution rules to employ a "multiplier" to determine how interests in cellular and broadband PCS licensees held indirectly through intervening corporate entities should be attributed.[11]

## III. DISCUSSION

### A. Attribution and Cellular Eligibility

17. In the *Broadband PCS Reconsideration*, we retained our five percent equity attribution threshold for broadband PCS licenses so that the same entity may not own five or more percent of licenses constituting more than 40 MHz within the same area. In the *Further Order on Reconsideration*, we implemented a "multiplier" to determine when non-controlling interests in cellular and broadband PCS licensees held indirectly through intervening corporate entities should be attributed.[12] We also retained our cellular attribution threshold of 20 percent equity ownership of a cellular licensee and our service area overlap test of 10 percent of the population of the relevant PCS market, so that an entity wishing to participate fully in PCS generally may not own more than 20 percent of a cellular license, and not more than 5 percent of a PCS license(s), that would place the entity above the spectrum limit in an overlapping service area. However, we raised the threshold for attributing non-controlling cellular ownership for rural telephone companies, small businesses, and businesses owned by women and minorities from a 20 percent to a 40 percent interest.[13] We relaxed the eligibility rules to permit

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[8] PCS providers, however, may offer private PCS service if they demonstrate a reasonable basis for overcoming the CMRS presumption. Additionally, local exchange carriers (LECs) are required to provide reasonable and fair interconnection for all CMRS providers, including PCS licensees. *See Second Report and Order*, GEN Docket No. 93-252, 9 FCC Rcd 1411 (1994) (hereafter *CMRS Second Report and Order*), *petitions for reconsideration pending*.

[9] *See Memorandum Opinion and Order*, ET Docket No. 92-9, 9 FCC Rcd 1943 (1994), *petition for reconsideration pending*. The emerging technologies proceeding, ET Docket No. 92-9, established the transition rules that PCS licensees and UTAM, Inc. will employ to gain use of spectrum currently being used by point-to-point microwave facilities. Previously in ET Docket No. 92-9, we adopted: *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); and *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993), *on reconsideration*, 9 FCC Rcd 1943 (1994).

[10] *See Fifth Report and Order*, PP Docket No. 93-253, FCC 94-178 (Released July 15, 1994).

[11] *See Further Order on Reconsideration*, GEN Docket No. 90-314, FCC 94-195, released July 22, 1994, *summarized* 59 FR 39704 (August 4, 1994), *petition for reconsideration pending*.

[12] For example, if Party A owns 10 percent of Company X, which owns 35 percent of, and controls, Company Y, which owns 25 percent of Licensee Z, then Company X's attributable interest would be 25 percent (100% x 25%) and Party A's effective interest would be 2.5 percent (10% x 100% x 25%). However, if Company X owns 35 percent of, but does not control, Company Y, then Company X's effective interest would be 8.75 percent (35% x 25%) and Party A's effective interest would be 0.875 percent (10% x 35% x 25%).

[13] *See Broadband PCS Reconsideration* at paras. 102-140.

entities with attributable interests in cellular companies whose combined CGSAs overlap between 10 and 20 percent of the PCS service area population to apply for more than 10 MHz of PCS spectrum provided that, prior to the auction, they commit to divest themselves of sufficient cellular interests to come into compliance with our eligibility rules within 90 days of license grant.[14]

**Positions of the Parties**

18. The Cellular Telecommunications Industry Association (CTIA) requests that the cellular-PCS ownership attribution standard be increased from 20 percent to 30-35 percent and that the population overlap standard be increased from 10 to 40 percent. CTIA claims that these higher limits would ensure competition without risking inadvertent harm to a nascent industry,[15] basing its claim on an antitrust market analysis it presented with a previous petition for reconsideration.[16] CTIA also presents an analysis of the impact of the population overlap standard on entities with attributable cellular interests in the top fifty BTAs, and in thirty other BTAs. Using these data as a baseline, the analysis purports to show how the number of entities barred from holding a 30 MHz in-market license under the current 10 percent overlap standard decreases as that percentage is increased to sequentially higher levels (*i.e.*, 20, 25, 30, 35, 40 percent). According to CTIA, the beneficiaries of raising the overlap standard would be "small cellular carriers" that are prevented by the current standard from "deliver[ing] on the promise of the information age to rural and small town America.[17]

19. Additionally, CTIA requests that the 35 MHz PCS cap be immediately raised to 40 MHz. If the Commission is not willing to immediately eliminate the 35 MHz cap, CTIA suggests that the cap be raised to 40 MHz one year after actual inauguration of services by a new PCS entrant in the relevant PCS service area.[18] Finally, CTIA requests that post-auction divestiture be made available to all cellular providers regardless of the degree of geographic overlap, instead of limiting post-auction divesture to cellular providers with a 10-to-20 percent overlap.[19]

20. Comcast Corporation (Comcast) requests that the attribution standard for purposes of cross-ownership and aggregation of spectrum be increased from 5 to 20 percent, provided that no more than a five percent voting interest is held, and the attribution standard be increased to 25 percent in publicly traded corporations, provided that no more than a 15 percent voting interest is held.[20] Comcast argues that the Commission has recognized that parties holding more than a five percent equity interest in a licensee may lack effective control of the licensee, and cites our decision to allow cellular interests to own up to 20 percent and designated entities to own up to 40 percent of a cellular provider without being limited in PCS participation.[21] Comcast bases its request on the relaxed attribution standards for entrepreneurial companies, arguing that the same standard should apply to all PCS investors and that we should differentiate between mere ownership and exercise control of a cellular provider or PCS provider.[22] Additionally, Comcast requests that all cellular entities be permitted to bid on PCS spectrum, subject to the condition that any disqualifying cellular interests be divested within six months of the PCS license award.[23] This request is based on the assertion that allowing divestiture only to auction winners with 20 percent or less overlap is arbitrary.[24] Comcast argues that the 90 day divestiture requirement is unrealistic, given the need to locate buyers, negotiate the transaction, and obtain this Commission's approval.[25]

21. Six parties commented on cellular eligibility and ownership attribution issues.[26] Three commenters urge us to retain the current rules, and three support changes to the rules. Commenters urging us to maintain the current rules assert that no new arguments or facts have been raised to justify changing the rules, or that the arguments raised by CTIA and Comcast are insufficient to justify a rule change.[27] American Personal Communications (APC) states that current estimates indicate that it will take up to ten years to clear microwave facilities fromthe PCS band. This fact, according to APC, coupled with the fact that cellular companies currently have technological infrastructure and marketing in place, places new PCS licensees at an initial competitive disadvantage.[28] APC also states that our bright-line attribution standards provide ease of administration, expedite the licensing process, and save the costs of disputing ownership structures and effective control.[29] APC further argues that relaxing the overlap and attribution standards could reduce the number of competitors in each market, to the detriment of consumer welfare.[30] Finally, APC asserts, our current rules limit the participation of those entities that have the greatest potential and incentive to compete less vigorously than possible, and provide for competition in each market.[31]

22. With respect to our rules on post-auction divestiture, commenters opposing a change point out that we limited post-auction divestiture to cellular entities having less than 20 percent overlap in order to guard against cellular operators with large overlap areas obstructing the licensing of new competitors by abusing the auction process. These

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[14] *See id.* at paras. 141-146.
[15] *See* CTIA Petition at 4.
[16] *See* S. Besen, W. Burnett, *An Antitrust Analysis of the Market for Mobile Telecommunications Services*, Attachment to CTIA Petition for Reconsideration of the *PCS Second Report and Order*.
[17] *See* CTIA, *Ex Parte Filing - Docket No. 90-314*, August 2, 1994, at 1-3.
[18] *See* CTIA Petition at 6.
[19] *See id.* at 7.
[20] *See* Comcast Petition at 2.
[21] *See id.* at 3.
[22] *See id.* at 4 (citing *Fifth Report and Order*, PP Docket No. 93-253, FCC 94-178, released July 15, 1994, *summarized* 59 FR 37566.
[23] *See id.* at 8-9.
[24] *See id.* at 8.
[25] *See id.* at 9.
[26] Commenters on cellular eligibility and ownership attribution were: BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp. (BellSouth), McCaw Cellular Communications, Inc. (McCaw), MCI, Pacific Bell Mobile Services (PacBell), APC, and Rural Cellular Association (RCA).
[27] *See* MCI Comments at 1; PacBell Comments at 4.
[28] *See* APC Comments at 4-5.
[29] *See id.* at 7-8.
[30] *See* APC Comments at 5.
[31] *See* PacBell Comments at 4-5.

parties argue that there would be no opportunity for competing bidders to determine whether a cellular provider's bid was sincere, or merely an attempt to increase the final price,[32] and that the possibility of such abuses would deter the entry of many potential bidders into the auction process, to the detriment of both competition and revenues.[33] Commenters also note that the 90-day divestiture requirement provides sufficient time for entities to divest their cellular holdings, especially as the 90 day period is in addition to the interval between the conclusion of auctions and the grant of the license. Commenters also contest the suggestion that it may be difficult to locate buyers, noting the existence of a ready-made market comprised of unsuccessful PCS bidders who, these commenters contend, are likely to be interested in acquiring cellular holdings.[34]

23. With respect to the PCS-cellular spectrum cap, commenters who oppose allowing cellular providers to immediately acquire 40 MHz of spectrum assert that the "head start" we are providing PCS providers is an attempt to compensate for the head start in clear spectrum, infrastructure, experience, and marketing enjoyed by cellular providers.[35] Further, these parties argue that the delay in allowing divestiture of 5 MHz blocks is based in part on the need to conduct further rule making to determine to what extent and in what fashion partitioning of PCS spectrum blocks is to be permitted.[36]

24. Other commenters support the elimination or easing of the restrictions on cellular participation in PCS. They maintain that reconsideration of our rules is appropriate because of the adoption of auction rules[37] and the experience of the narrowband PCS nationwide auction. These parties assert that in most markets, cellular carriers will not qualify for the entrepreneur blocks because of the size of such carriers, and that this will assure at least two new PCS licensees using the entrepreneur blocks. They further assert that the fact that the winners in the narrowband PCS auction were all large companies already involved in paging, which is one type of narrowband PCS, demonstrates that companies already providing analogous services will value the spectrum most highly, and therefore will pay the most for it.[38] Accordingly, they contend that revenues to the Treasury will be maximized by the full participation of cellular incumbents, and the existence of designated entity and entrepreneurs' blocks will guarantee competition.[39] Further, these parties argue that allowing full participation will serve Congressional and Commission goals by ensuring efficient use of the spectrum, maximum recovery by the Treasury of the value of the spectrum, diversity in licensees (by including cellular incumbents) and rapid deployment of PCS.[40] These parties also contend that there is no evidence that cellular providers will behave in an anticompetitive fashion, and market analysis indicates that these companies will be unlikely to dominate the PCS market.[41] These assertions are the basis of BellSouth's argument that cellular companies should be allowed unrestricted access to PCS blocks, and McCaw Cellular Communications, Inc.'s (McCaw's) and Rural Cellular Association's (RCA's) support of CTIA's petition for setting the population overlap standard at 40 percent and the ownership attribution standard at 30-35 percent.[42] RCA further seeks to exempt rural cellular companies entirely from all limitations, arguing that rural cellular companies will provide quality mobile service and will not threaten competition because they are mere passive investors in cellular providers. RCA also argues that the Congress specifically directed the Commission to ensure licensing opportunities for rural cellular companies.[43]

25. With respect to post-auction divestiture, McCaw argues that all bidders should be allowed to bid and divest only upon winning. McCaw maintains that the existing low attribution thresholds create the possibility of an affiliate of a cellular company interfering with the cellular company's ability to hold a license, without the affected cellular company's knowledge.[44] BellSouth asserts that entities with large cellular holdings will not be tempted to abuse the bidding process because they could win and be forced to pay the full price of the PCS license.[45]

26. McCaw echoes CTIA's assertion that the marketplace can best allocate the additional 5 MHz of spectrum at issue, and therefore urges us to eliminate the 35 MHz interim spectrum cap for cellular entities.[46] BellSouth asserts that the spectrum cap should be the only limit on cellular participation, and that our CMRS proceeding has established a 45 MHz cap on combined cellular, PCS, and SMR spectrum. It argues that 45 MHz should be the cap for cellular-PCS ownership because that is the cap adopted in the CMRS proceeding.[47]

27. BellSouth further advocates that we use its "multiplier" formula to determine attributable ownership. This formula multiplies spectrum in megahertz, population overlap, and percentage of ownership to arrive at its final attribution factor. BellSouth asserts that this formula produces a more accurate picture of ownership and control, and is consistent with/our use of a multiplier in attributing interests to indirect owners.[48] Finally, BellSouth urges us to exempt LECs from attribution of their cellular spectrum when that spectrum is held by a separate subsidiary, claiming that it is forbidden by our rules from having any degree of control over BellSouth Cellular Corporation.

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[32] *See* MCI Comments at 2; PacBell Comments at 3-4; APC Comments at 10.
[33] *See* APC Comments at 10.
[34] *See* APC Comments at 11.
[35] *See* APC Comments at 8; PacBell Comments at 6.
[36] *See* MCI Comments at 1-2.
[37] *See Fifth Report and Order*, PP Docket No 93-253, FCC 94-178, *summarized* 59 FR 37566 (July 22, 1994); *Order on Reconsideration*, PP Docket No. 93-253, FCC 94-217 (August 15, 1994).
[38] *See* BellSouth Comments at 6-8.
[39] *See id.* at 9-10.
[40] *See id.* at 10-17.
[41] *See id.* at 17-20.C
[42] *See id.* at 5-21; RCA Comments at 1-2; McCaw Comments at 2-3.
[43] *See* RCA Comments at 3-5.
[44] *See* McCaw Comments at 3.
[45] *See* BellSouth Comments at 28.
[46] *See* McCaw Comments at 6.
[47] *See* BellSouth Comments at 22 (citing *Third Report and Order*, Gen. Docket No. 93-252, FCC 94-212, adopted August 9, 1994).
[48] *See* BellSouth Comments at 36-37.

BellSouth asserts that its proposal would permit LECs to provide PCS, and is fair because LECs have no control over their cellular subsidiaries.[49]

28. CTIA requests reconsideration of our decision to limit the option of auction participation followed by divestiture of disqualifying holdings to cellular providers whose population overlap is between 10 and 20 percent.[50] Comcast makes the same request, and further requests that we increase the time allowed for divestiture from 90 days to six months.[51] Both parties argue that there is no difference whether a cellular company holds more or less than 20 percent overlap, if it will divest itself of sufficient overlap in order to meet our requirements. CTIA specifically states that our concern that a cellular provider with more than 20 percent overlap might be tempted to interfere with the auction process is ill-founded, as such a cellular provider could find itself in the possession of a PCS license and be forced to quickly divest a large share of its cellular holdings. This argument is echoed by BellSouth and McCaw.[52]

29. Five parties replied on eligibility and attribution issues. APC and Pacific Bell Mobile Services (PacBell) urge us to maintain our current cellular eligibility and attribution standards, asserting that the entrepreneurs' blocks are insufficient by themselves to promote full competition in PCS,[53] that BellSouth's comments focus on revenues to the government without sufficient consideration of other Commission goals,[54] and that our current limits on cellular eligibility are necessary to provide opportunities for full competition in PCS.[55] In their replies, CTIA and Comcast essentially reiterate their petitions, advocating relaxation of the overlap and attribution thresholds,[56] asserting that cellular providers do not have a substantial competitive advantage over other entities in PCS,[57] and again urging a relaxation of the standards and timing of post-auction divestiture.[58] Ameritech proposes a mechanism whereby cellular providers would be allowed to divest any amount of interest to an interim independent trustee before the auction. After the auction, the trustee would dispose of the interest if the cellular provider won a PCS license, or would otherwise reconvey the interest to the cellular provider.[59] Ameritech claims that this would allow participation by cellular entities in PCS auctions, while maintaining Commission control over the auction process.[60]

**Discussion**

30. Our rules concerning ownership attribution and population overlap standards have been thoroughly debated and considered in earlier phases of this proceeding. The arguments presented on the current record for revising those rules are in most essential respects repetitious, and we deny Comcast's and CTIA's petitions in major part on that basis. The record persuades us to modify our rules, however, to permit entities with attributable, non-controlling cellular interests to bid on in-market 30 MHz PCS licenses, on condition that they must divest prohibited cellular interests within 90 days of PCS license grant. We discuss these decisions more fully below.

31. Our principal goals for PCS include affirmatively promoting competition and preventing anticompetitive behavior.[61] The former goal flows from our explicit mandate under the Communications Act to promote competition in telecommunications and widely disseminate telecommunications licenses.[62] As such, arguments that our rules should be based wholly on the law of antitrust and corporate control are misplaced. Even if we agreed with the portrayal of antitrust law by Comcast, CTIA and their supporters (and we do not), antitrust and corporate control considerations are not the sole foundation of our rules. Rather, in accordance with our statutory mandate, those rules reflect a balance of many public interest considerations, including the need to provide parties other than existing cellular licensees an opportunity to participate in PCS. No party offers a persuasive rationale for rearranging those considerations to reflect a different balance.

32. Moreover, the petitioners' individual requests are flawed. We do not accept CTIA's unconditioned assertion that interests of 30-to-35 percent do not evidence control, which is not a uniformly supported position. For example, the Financial Accounting Standards Board ("FASB") explicitly states that an ownership interest above 20 percent presumptively demonstrates control unless evidence to the contrary is established.[63] Comcast's claim that it is unreasonable to set the PCS ownership attribution standard at 5 percent when the cellular attribution is higher ignores the reasoned basis for existing distinctions.[64] CTIA's request that we increase to 40 MHz the combined amount of attributable cellular/PCS spectrum an entity may hold immediately overlooks the fact that it is not possible, even if it were permitted, to acquire that spectrum combination given existing allocations and licensing mechanisms.[65] Ar-

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[49] *See* BellSouth Comments at 38-39.
[50] *See* CTIA Petition at 7-8.
[51] *See* Comcast Petition at 7-9.
[52] *See* CTIA Petition at 8; McCaw Comments at 3; BellSouth Comments at 27.
[53] *See* APC Reply at 3.
[54] *See* PacBell Reply at 3.
[55] *See* APC Reply at 4-5; PacBell Reply at 4-7.
[56] *See* CTIA Reply at 2-3; Comcast Reply at 2-4.
[57] *See* CTIA Reply at 3-8.
[58] *See* Comcast Reply at 5-9.
[59] *See* Ameritech Reply at 1-2.
[60] *See id.* at 5.
[61] *See Broadband PCS Reconsideration* at para. 103.
[62] *See* 47 U.S.C. § 309.
[63] See FASB Accounting Principles Board Opinion No. 18 (1970).
[64] As we explained in the *Broadband PCS Reconsideration*, the attribution standard for cellular interests other than designated entities is set at 20 percent to account for our policy in the early days of the cellular industry to encourage the formation of settlement groups -- a historic anomaly that has no counterpoint in the PCS context. Attributions levels are set higher for designated entities in accordance with our statutory mandate to promote opportunities in PCS for such entities. *See Broadband PCS Reconsideration* at paras. 123-132.
[65] Cellular spectrum is allocated in blocks of 25 MHz, while PCS spectrum is allocated in blocks of 10 and 30 MHz, so no combination of cellular and PCS spectrum totals 40 MHz. The opportunity to achieve that total will exist when licensees are permitted to disaggregate spectrum, a process for which we have not yet adopted rules, although we are committed to addressing the legal and technical issues that must be resolved in order to adopt such rules. See *Broadband PCS Reconsideration* at paras. 66-71.

guments that raising the population overlap standard from 10 to 40 percent will not harm competition, and will actually increase competition in rural areas, are not well supported. Although CTIA submitted a study showing that smaller cellular carriers may benefit from increasing the overlap standard, the study also shows benefits flowing to very large carriers and covers fewer than 20% of total BTAs.[66] Such incomplete data and uneven results do not justify altering our rules.

33. We agree, however, that is is appropriate to modify our cellular elegibility rule (47 C.F.R. § 24.204) to create additional opportunities for entities with non-controlling, attributable in-market cellular interests to participate in PCS auctions, on condition that they divest prohibited cellular holdings within 90 days of PCS license grant. In the *Broadband PCS Reconsideration*, we limited the "bid but divest" option to entities with in-market cellular interests that overlap the population of a PCS service by less than 20 percent, on the theory that entities with larger overlaps may have incentives to delay the rapid introduction of PCS.[67] We are persuaded that the rule's exclusive emphasis on the degree of overlap is misplaced because the anticompetitive incentives the rule is designed to combat in the auction process are in principal part generated by the amount of the attributable cellular interest involved, and only secondarily by the degree of overlap. Indeed, our discussion of that rule at the time it was adopted explicitly recognized a link between the amount of the cellular interest involved and the possibility of anticompetitive abuse.[68] We now conclude that entities holding controlling interests have greater incentives to act anticompetitively in the auction process than entities with non-controlling interests, so we will retain the existing rule as it applies to attributable controlling interests. We will supplement Section 24.204, however, to permit non-controlling interests to participate in the auction process without regard to the degree of overlap. We define a "non-controlling" license interest to be one in which the holder has less than a 50 percent voting interest and there is an unaffiliated single holder of a 50 percent or greater interest.

34. Finally, we disagree with parties that claim our rules fail to provide an adequate post-auction period for winning bidders to divest prohibited cellular interests in order to comply with our cellular/PCS cross-ownership rules.[69] We note that this period is more than just 90 days, because the period between winning the auction and issuance of license also must be considered. In addition, our rule extends well beyond the 90 days from grant of license period, discussed *supra*, because parties who are unable to divest within that time may satisfy the requirement by conveying a prohibited cellular interest to an independent trustee for an interim period. *See* 47 C.F.R. § 24.204(f)(3)(i). We take this opportunity to clarify that the trustee must divest that interest within six months from grant of license.

### B. Microwave Relocation Cost Sharing

35. In 1992 we established a proceeding, ET Docket No. 92-9, for the purpose identifying spectrum for emerging technologies such as PCS. In the *First Report and Order* and *Third Report and Order* in that proceeding we established a plan for relocating incumbent licensees in emerging technology bands to other frequencies or alternative media.[70] Pursuant to that plan, PCS licensees are required to avoid interference to incumbent point-to-point microwave operations, and to fully compensate such licensees' relocation costs.

#### Positions of the Parties

36. PCIA requests that we mandate participation by PCS licensees in the 1850-1990 MHz band in a plan to share the costs occasioned by relocating microwave licensees in that band.[71] Absent mandatory cost sharing, PCIA argues, the spectrum-clearing efforts of early PCS market entrants will redound inequitably to the benefit of later entrants. PCIA asserts that we must establish cost sharing obligations prior to auctions so bidders can value spectrum accurately. According to PCIA, the three basic principles of a cost sharing plan should be:

> First, a cost sharing obligation should be predicated on a finding that a PCS licensee's operations would have caused interference to a microwave system's link path but for the relocation of that system.
>
> Second, when multiple PCS licensees benefit from relocation, individual PCS licensees should be required to pay a pro-rata share only of the documented, direct costs of relocation. These would be limited to the costs of supplying a microwave licensee with comparable facilities in a different band, and would not include any premium costs an early PCS entrant might pay to accelerate a microwave licensee's relocation.
>
> Third, a payment obligation should not arise until the time interference would be caused.

37. BellSouth, GTE, MCI, PacBell Mobile and UTAM support the principle of microwave relocation cost sharing. Although these parties offer mostly general statements of support, GTE echoes PCIA claim that establishing cost sharing obligations prior to auctions will enable bidders to value spectrum more accurately and, for this reason, the issue should be determined in this proceeding, rather than deferred to a future rulemaking.[72] In expressing its support, UTAM contends that PCIA's plan is similar to a proposal by UTAM earlier in this proceeding concerning relocation efforts in unlicensed PCS bands.[73]

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[66] For example, CTIA's analysis states that in the 18 BTAs that comprise the Chicago MTA, increasing the overlap standard to 30% creates licensing opportunities for eleven carriers, two of whom are Sprint and Southwestern Bell. *See CTIA Exparte Filing*, Aug. 2, 1994.

[67] *Broadband PCS Reconsideration* at paras. 141-146.

[68] *See Broadband PCS Reconsideration Order* at para. 143.

[69] *See, e.g.*, Comcast Petition at 9.

[70] *See First Report and Order and Third Notice of Proposed Rulemaking*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992); *Third Report and Order and Memorandum Opinion and Order* , ET Docket No. 92-9, 8 FCC Rcd 6589 (1993).

[71] *See* PCIA Petition at 5-6.

[72] *See* GTE Reply at 2-3.

[73] *See* UTAM Reply at 1-3.

38. UTC notes that while there is merit in the idea of establishing a cost sharing mechanism for microwave relocation in the 1850-1990 PCS band, the development of such a plan is beyond the scope of a petition for reconsideration in this proceeding, and is a subject more properly raised in a separate petition for rule making. UTC states that such a rulemaking could be instituted without delaying the roll-out of PCS. Moreover, UTC cautions that the development of a cost-sharing plan must not be allowed to adversely impact the market-based or individually negotiated aspects of the Commission's microwave transition plan.[74]

**Discussion**

39. We share UTC's reservations about the current undeveloped state of PCIA's proposal, and for that reason will deny PCIA's petition for reconsideration. We do so without prejudice to its cost sharing proposal, which PCIA and other interested parties are free to submit in a separate petition for rulemaking.

40. We take this action because while eliminating any "free rider" aspect of microwave relocation through mandatory cost sharing is an attractive idea in theory, PCIA's proposal simply is not sufficiently developed to warrant adoption at this time. Since the proposal's key terms are ambiguous, adopting it at this time likely would not assist potential bidders' efforts to value spectrum accurately. Indeed, such ambiguity may detract from those efforts. Moreover, such ambiguity increases the likelihood that this Commission will be called upon to adjudicate complex disputes that are almost wholly of a commercial nature (*e.g.*, whether a particular PCS licensee actually "benefitted" from a relocation, and to what extent; the amount of the "direct" costs of that relocation, as opposed to the "premium" costs; and the appropriate basis for measuring each PCS licensee's "pro-rata" share of such costs). We find in this record no persuasive argument for deploying our limited resources in this manner.

41. It bears emphasis that relocation costs are expected to be a relatively small portion of PCS licensees' total costs. Moreover, in the *MO&O* we significantly reduced microwave relocation cost burdens by revising the PCS band plan to provide for PCS operations in the comparatively less heavily loaded 1850-1990 MHz band, rather than in accordance with the band plan initially adopted in the *Second Report and Order*. Finally, we note that we recently made available to the public a wealth of information on microwave co-channel and adjacent channel usage in the 1850-1990 MHz band, thereby increasing the public's ability to value that spectrum accurately prior to auctions.

**C. Service Areas**

42. Point Communications Company (Point), the Association of Independent Designated Entities (AIDE), and Puerto Rico Telephone Company (PRTC) request modifications and/or clarifications of the service areas that we have adopted for PCS.

43. *Revised Service Areas.* Point requests that we use the Department of Commerce's "BEA Economic Areas" (BEAs)[75] to delineate all PCS licenses, on the ground that designated entities licensed to serve BTAs cannot compete with large companies licensed to serve MTAs. According to Point, BEAs provide equal service areas, and are small enough to create meaningful opportunities for designated entities, while large enough to attract major spectrum bidders. Alternatively, if BEAs are not employed, then Point requests that the Commission subdivide some MTAs, particularly those on the West Coast.[76] Finally, Point requests that we vary the spectrum blocks designated for entrepreneurs from market to market. Point contends that if designated entities were to have larger corporations on their frequency blocks in other markets, the companies would ensure that the smaller ones do not lag in technological or service development.[77]

44. In the *PCS Second Report and Order*, we based the service areas for broadband PCS on MTAs and BTAs. We concluded that a combination of MTA and BTA service areas would promote the rapid deployment and ubiquitous coverage of PCS and a variety of services and providers. We also stated our belief that a combination of MTA and BTA service areas would maximize the benefits of having both large and small service areas.[78]

45. In the *Broadband PCS Reconsideration*, we further addressed the possibility of using BEAs as the PCS service areas. We acknowledged that identical geographic areas could impose more initial competitive parity, but stated that such a plan was likely to foreclose cellular providers and prove too large for many designated entities to finance. Congress has mandated that we provide areas that promote opportunity for a wide variety of applicants,[79] and we determined that the two tier system provided by the use of MTAs and BTAs best met this mandate.[80]

46. MCI Telecommunications Corporation (MCI) and PacBell address Point's petition. Both simply assert that Point's proposed BEA plan was proposed by NTIA in the prior reconsideration, discussed in the *Broadband PCS Reconsideration* and there rejected. Both commenters state that this issue has been dealt with adequately.[81] MCI adds that any reconsideration of service areas would inevitably delay the auction and licensing and inauguration of PCS.[82] No replies addressed this issue.

47. We have previously addressed Point's contentions respecting BEA-defined service areas in the *PCS Second Report and Order* and *PCS Broadband Reconsideration*, and

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[74] *See* UTC Comments at 7.

[75] In its comments to the *Notice of Proposed Rule Making and Tentative Decision* in this proceeding, the National Telecommunications and Information Administration (NTIA) proposed that PCS be licensed using the 183 "economic areas" defined by the Department of Commerce's Bureau of Economic Analysis (BEA). NTIA stated that each of these economic areas generally consists of a Metropolitan Statistical Area (MSA) or a similar area that serves as a center of economic activity and surrounding counties that are economically related to the center.

[76] *See* Point Petition at 1-4.

[77] *See id.* at 5.

[78] *PCS Second Report and Order*, 8 FCC Rcd at 7729-34 (paras. 64-78).

[79] *See* 47 U.S.C. § 309(j)(4)(C).

[80] *See Broadband PCS Reconsideration* at paras. 77-78.

[81] *See* MCI Comments at 4; PacBell Comments at 2-3.

[82] *See* MCI Comments at 4.

Point has here offered no new information or argument to justify a change in our decision. Nor can we accept Point's assertion that varying the entrepreneurs' blocks from market to market will create blocks where entrepreneurs will occupy the same frequencies as larger companies in other markets, which will promote cooperation and assistance to the entrepreneurs from the large companies.[83] We specifically changed the frequency allocation to PCS to minimize the difficulty of switching frequencies within or between blocks.[84] Given the level of equipment technology available, we do not expect that sharing frequency blocks will provide any incentive to form the frequency block communities envisioned by Point. Rather, we believe that if a licensee had different blocks in different service areas, it would generally tend to switch frequencies rather than establish a relationship with counterpart licensee(s) using the same frequencies elsewhere. For this reason, we do not believe that varying the spectrum for the entrepreneurs' block from market to market will have a salutary effect, and we decline to make such a change.

48. *Permitted Use of MTAs/BTAs.* AIDE requests that the Commission expand the rationale upon which we based PCS service areas on Rand McNally MTA/BTA definitions. AIDE suggests that we explicitly include Rand McNally's written clarification, as set forth in correspondence with AIDE's attorney, that a licensing agreement between Rand McNally and PCIA was intended to grant broad rights to potential users and repackagers of Rand McNally's MTAs and BTAs. No party addressed AIDE's request for clarification.

49. On February 10, 1994, PCIA and Rand McNally entered into a License Agreement.[85] Under this agreement, Rand McNally grants PCIA and all other interested parties "a nonexclusive license to reproduce, create derivative works from, publicly distribute and publicly display" the listing of counties that comprise Rand McNally's 487 BTAs and 47 MTAs, the BTA/MTA Map contained on pages 38-39 of the 1992 version of Rand McNally's *Commercial Atlas & Marketing Guide*, and derivative works created there from for the purpose of preparing documents in connection with PCS and other services, provided that the appropriate copyright legend is displayed.

50. On February 25, 1994, AIDE requested clarification from Rand McNally concerning the scope of the Licensing Agreement.[86] On March 10, 1994, Rand McNally stated that the License "Agreement was intended to grant broad rights to potential users and repackagers", regardless of whether "the use was carried out on a cost-recovery basis or profit-making basis".[87]

51. We have reviewed the Licensing Agreement between PCIA and Rand McNally and the Clarification of the Agreement between AIDE and Rand McNally. It is not our practice in rulemaking proceedings to clarify the meaning of private commercial contracts and related correspondence, and we have not been provided any persuasive reason to depart from that practice here. Our reasons for using the MTA/BTA system, the licensing agreement between Rand McNally and PCIA, and the related correspondence filed with AIDE's petition are matters of public record. We will let that record speak for itself, absent a demonstration that clarification is needed to further the public interest.

52. *Local Service Areas in Puerto Rico.* PRTC requests that the Commission reinstate the previously adopted unitary Puerto Rico BTA, arguing that Puerto Rico is in reality a single market. PRTC claims that the original BTA was appropriately tailored to the natural flow of commerce, arguing that the mountain range does not cause difficulties in travel nor separate the island into two areas. PRTC also states that the island is geographically one of the smaller BTAs.[88] Finally, PRTC states that a single BTA would facilitate the provision of lower cost service to all of Puerto Rico, arguing that the costs to consumers of constructing and operating a PCS network would be lower if the costs are shared by end users across the island than if consumers in the new, smaller BTAs must support an independent system serving the more thinly populated sectors of the island.[89]

53. In the *PCS Second Report and Order*, we established Puerto Rico as a single, BTA-like service area. In a petition for reconsideration of that decision, Pegasus Communications, Inc. (Pegasus), requested that we divide the Puerto Rico service area into two local service areas. Pegasus argued that due to the size and mountainous terrain of the island, Puerto Rico essentially is split in half, comprising two commercial centers: San Juan and Mayaguez-Ponce. Pegasus stated that these mountains make travel to San Juan difficult for Puerto Ricans located in the southern and western portions of the island, and therefore they must conduct essentially all commerce in the port cities of Mayaguez, Aguadilla, or Ponce. Pegasus also stated that the population of its proposed Mayaguez/Aguadilla-Ponce service area is more than one million and this area would be larger in population than several of the existing BTAs. Pegasus provided a list of municipios that it suggests constitute the Mayaguez/Aguadilla-Ponce service area, and suggested that the San Juan service area consist of all municipios not listed for the Mayaguez/Aguadilla-Ponce BTA-like service area.[90] No party responded to this petition. Accordingly, we adopted Pegasus' suggestion and established two separate service areas in Puerto Rico, one for Mayaguez/Aguadilla-Ponce and one for San Juan. We stated that this change recognizes the difficulties created by the mountain range separating these two areas and that we found this adjustment to be in the public interest.[91]

54. In response to PRTC's petition, Pegasus states initially that PRTC had ample opportunity to address the division of Puerto Rico into two BTAs in the previous reconsideration of the broadband PCS rules, and in failing to do so, lost the right to petition here for a reversal of that decision.[92] Pegasus also asserts that PRTC presents no facts

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[83] *See* Point Petition at 5.

[84] *See Broadband PCS Reconsideration* at paras. 33, 35.

[85] See AIDE Petition at Attachment B.

[86] See letter to Ms. Deborah Lipoff, Rand McNally, from William J. Franklin, AIDE Petition Attachment C.

[87] See letter from Deborah Lipoff, Rand McNally, to William J. Franklin, AIDE Petition Attachment D.

[88] PRTC Petition at 3-9.

[89] *Id.* at 9-11.

[90] The primary political divisions of Puerto Rico are termed "municipios." *See 1990 Census of Population and Housing [,] Summary Population and Housing Characteristics [for] Puerto Rico*, 1990 CPH-1-53, Issued November 1991 by the Bureau of the Census, at page A-5. In its petition, Pegasus translates "municipios" to be "counties." We use the term "municipios" to avoid confusion.

[91] *Broadband PCS Reconsideration* at para. 79.V

[92] *See* Pegasus Comments at 2-3.

that justify its request to consolidate Puerto Rico into a single BTA,[93] and presents a number of geographical and economic factors which support the division of Puerto Rico into two BTAs.[94] PRTC replies that its petition is timely and proper at this stage of the proceeding, and would benefit the public interest.[95] PRTC also reiterates the facts presented in its petition, and asserts that they support the need for Puerto Rico to be a single BTA.[96] In a late-filed response, Pegasus seeks to rebut several of PRTC's factual assertions.[97]

55. We continue to believe that the division of Puerto Rico into two BTA-like service areas is appropriate for this service. We note that the 1990 census for Puerto Rico is 3,522,037.[98] The population of the new Mayaguez/Aguadilla-Ponce service area is 1,048,473 and the population of the new San Juan service area is 2,473,564. Only 49 of the 493 BTAs have a population greaterthan 1,048,473 and only 18 BTAs have a population greater than 2,473,564.[99] We find that the population of each of these service areas is sufficient to support broadband PCS services.[100] Additionally, we conclude that the patterns of local trade make the proposed division economically and geographically desirable. If PRTC is correct, and Puerto Rico is better served by a single, island wide BTA, this can be effected by networking the two BTAs into what amounts to a single structure. The two BTA plan allows for this, while at the same time allowing the two BTAs to be served separately if that is the best method. Hence, the current plan offers more choices, and allows the marketplace to decide which is the better choice. Nor do PRTC's arguments persuade us to reinstate a unitary local service area for Puerto Rico.[101] Accordingly, we will maintain two BTA-like service areas in Puerto Rico for broadband PCS services.

### D. Technical Issues

56. *Licensed Service, Power Limits.* In the *Broadband PCS Reconsideration,* we increased the maximum base station transmission limit from 100 to 1640 watts equivalent isotropically radiated power (EIRP) with an antenna height up to 300 meters height above average terrain (HAAT).[102] We adopted this amendment in order to improve PCS licensees' ability to configure their systems to best serve the needs of their customers and to compete with other mobile services such ascellular and wide-area SMR. Spatial Communications, Inc. and ArrayComm, Inc. (SCI/ArrayComm) make two, related requests. First, they ask that the rules governing limitations on transmitted power be redefined in units of power per unit bandwidth, rather than expressed as limits on individual transmitters (regardless of bandwidth).[103] SCI/ArrayComm argues that the current rules define transmitter power limits in a manner that favors the use of narrowband over wideband transmissions.

57. Second, however power limits are defined, SCI/ArrayComm states that by maintaining a power limit of 100 watts per transmitter the Commission may have inadvertently discouraged the use of smart antenna technology. SCI/ArrayComm asserts that applying low transmitter power limits to use of highly directional antenna technology will preclude larger and more economic cell sizes by restricting the effective range of "broadcast" control channels that determine the ultimate size of the coverage area.[104] SCI/ArrayComm requests the transmitter power limit of 100 watts apply to individual base station transmitters without regard to the number of such transmitters employed at each base station, the antenna element or elements to which each transmitter is connected, or the channels in which each transmitter is allowed to transmit. SCI/ArrayComm argues that this clarification is needed to ensure that the power limits do not unfairly disadvantage new technologies, such as smart antennas.[105]

58. Five comments address SCI/ArrayComm's request for clarification.[106] MCI, Motorola and Northern Telecom support the petition in part.[107] As to the definition of power limits, MCI recommends that the Commission, while maintaining the overall base station power limit of 1640 watts EIRP, give careful consideration to the proposed bandwidth-based method of defining power suggested by SCI/ArrayComm. MCI states that the Commission may wish to authorize the use of the SCI/ArrayComm formula as an alternative method, at the carrier's option. Motorola states that it is still analyzing the ramifications of adopting

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93 *See id.* at 4-5.

94 *See id.* at 6-10.

95 *See* PRTC Reply at 3-6.

96 *See id.* at 6-9.

97 *See* Pegasus Response to Reply of PRTC. This response was late filed, and could have been dismissed for that reason, despite Pegasus' assertion that it reserved the right to rebut factual assertions by PRTC. For the sake of completeness of the record, however, we consider this response.

98 *See id.* at 1.

99 *See* Rand McNally *1992 Commercial Atlas & Marketing Guide,* "Population, Income and Sales Data for the 150 Largest Basic Trading Areas," at page 44, Census 4/1/90 column.

100 We note that Puerto Rico is licensed as five MSAs and seven Rural Service Areas (RSAs) in the Domestic Public Cellular Radio Telecommunications Service.

101 PRTC provides cellular telephone throughout Puerto Rico. Thus PRTC, like all in-market cellular operators, is initially limited to one 10 MHz BTA license in any geographic area of Puerto Rico. We note however that, under the current rules, PRTC can purchase a 10 MHz license in both BTAs and thus serve the entire island. We do not believe that the adopted licensing scheme greatly affects PRTC. However, we believe that a single BTA potentially could preclude many individuals and companies from competing against PRTC.

102 *Broadband PCS Reconsideration* at paras. 172-174. Base station antennas may exceed 300 meters with a corresponding reduction in power. Mobile/portable stations are limited to 2 watts EIRP and must limit power to the minimum necessary for successful communications. *See* § 24.232 of the Commission's Rules.

103 SCI/ArrayComm are developers of Spatial Division Multiple Access (SDMA) technology, which uses patented algorithms to implement "smart antennas" that assign specific antenna elements to track mobile users and selectively direct RF energy to them.

104 SCI/ArrayComm Petition at 6.

105 For clarity, SCI/ArrayComm adds that it should be acceptable for more than one base station transmitter to transmit 100 watts of power in the same RF channel at the same time as long as different antenna elements are used for each transmitter, *i.e.,* power level as measured at the input to an antenna element. SCI/Arraycomm Petition at 6-7.

106 Comments on this issue were filed by MCI, Motorola, Northern Telecom, APC and Sprint Corporation (Sprint).

107 *See* Motorola Comments at 11; MCI Comments at 5; Northern Telecom Comments at 6-7.

a "watts per hertz" standard. Northern Telecom states that it is concerned that, while the SCI/ArrayComm proposal to redefine the power limits does lead to an acceptable power level, the formulation of the new limits is unduly complicated and likely to lead to confusion. Sprint states that SCI/ArrayComm's complaint that expressing power limits in watts per channel favors narrowband channelization is inconsistent with its previous statement that its technology is compatible with all modulations.[108]

59. As to the "per transmitter" provision, Motorola states that it believes the current rules can be reasonably interpreted as indicating that the adopted power limits apply to individual base station transmitters without regard to the number of co-channel transmitters employed at each base station, but does not object to clarification of the rule. Northern Telecom supports clarification that the power limits apply to individual transmitters. APC asserts that our rules are clear on power limits and require no clarification.[109]

60. With respect to the redefinition issue, SCI/ArrayComm replies that, contrary to Sprint's statement, SCI/ArrayComm's concern is not about competitive advantages, but is intended to maximize flexibility in PCS system design.[110] Motorola indicates that, upon further analysis, it is convinced that the existing rule of 100 watts maximum transmitter power with a limit of 1640 watts maximum EIRP is adequate to provide design flexibility and excellent system performance.[111] Motorola supports the connection of multiple transmitters to an antenna array, provided the total EIRP does not exceed 1640 watts as averaged over a defined time interval so as not to exceed established interference criteria.[112] In response to SCI/ArrayComm's statement that the existing rules favor narrowband technologies, Motorola notes that many factors determine overall system design and performance capability and that this issue alone will not affect the introduction and use of wideband PCS technologies. It cites the number of wideband systems currently under development as evidence that the rules are flexible and technology-neutral. No reply comments address the "per transmitter" clarification.

61. *Discussion.* As an initial matter, we decline SCI/ArrayComm's request to redefine transmitter limits in power per hertz or power per unit bandwidth. While SCI/ArrayComm states that the current power per channel specification favors narrowband over wideband systems, the existing approach simply leaves to the licensee the determination how to balance the multiple design considerations in its system, from transmitter power and configuration to the gain achieved by receivers, without placing any overall limit on system power so long as its individual transmitters and field strength data comply with our rules. As Motorola observes, system design partakes of many considerations other than the power tradeoffs inherent in narrowband and wideband systems.[113] We find that our current definition of power limitations does not constrain licensees considering such choices; nor does it significantly favor one technology over another. Moreover, SCI/ArrayComm has not explained its contention that the rules discourage highly directional antenna technology in its petition or comments. For these reasons, we deny SCI/ArrayComm's request to redefine the transmitter power limits.[114]

62. As regards power levels per transmitter, antenna or antenna element, it was always our intent that the 100 watts per channel and 1640 watts EIRP requirements apply to these individual components and not to the sum of all components at the entire base station, provided the maximum EIRP radiated by the base station in any given direction on any given channel does not exceed 1640 watts. This interpretation is consistent with our application of similar rules in the cellular service. We believe that this statement is of itself sufficient interpretation of this provision of the rules, and no amendment to the rules is needed.

63. *Licensed Service, Out-of-band Emission Levels.* Omnipoint Corporation (Omnipoint) requests that an emission mask, similar to the one specified for isochronous unlicensed PCS devices, be adopted for licensed PCS out-of-band emissions using a resolution bandwidth on the measurement instrument approximately equal to one percent of the emission bandwidth of the device under test.[115] Omnipoint states that the Commission should specify out-of-band emissions separately from spurious emissions, arguing that out-of-band emissions are dependent on the PCS system's modulation techniques and modulation rates. Omnipoint also states that the Commission's ability to measure and monitor out-of-band emissions would be greatly simplified by the use of a modulation mask. Omnipoint states that a modulation mask, which permits constant envelope digital modulations to operate in the band, would ensure that low cost equipment could be deployed in both the licensed and unlicensed bands. Finally, Omnipoint suggests that the current rule for emission limits[116] applies only to spurious emissions.[117]

64. Celeritek Incorporated (Celeritek) strongly supports adoption of an out-of-band emission mask that allows the use of constant envelope modulation formats. MCI, how-

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[108] *See* Sprint Comments at 2-3.

[109] *See* APC Comments at 5.

[110] *See* SCI/ArrayComm Reply at 2-5.

[111] *See* Motorola Reply at 4.

[112] Motorola does not provide technical details as to how this averaging should occur or the time interval that should be employed.

[113] For example, the material contained in the SCI/ArrayComm *ex parte* filing suggests that changing the regulations to specify power limits in terms of watts per hertz could significantly increase the transmission range of a PCS base station. This could have the further effect of increasing the potential for interference to existing microwave users, or possibly reducing interference compared to covering the same area with multiple, smaller sized cells employing omnidirectional systems. The implications of the proposed redefinition for coordination requirements of PCS licensees, including the potential for delays in providing service to the public, are not sufficiently developed on this record to support such a fundamental change as SCI/ArrayComm proposes.

[114] We stress that our denial is without prejudice to a subsequent petition for rule making, should SCI/ArrayComm or other parties wish to pursue these issues on a more fully developed record.

[115] Omnipoint Petition at p. 6-8 and Figures 1,2. An out-of-band emission is an emission on a frequency or frequencies immediately outside the necessary bandwidth which results from the modulation process, excluding spurious emissions. *See* 47 C.F.R. § 2.1. *See also* § 15.323(d) of the Commission's Rules for the isochronous devices' modulation mask.

[116] *See* § 24.238 of the Commission's Rules.

[117] A spurious emission is an emission on a frequency or frequencies which are outside the necessary bandwidth and the level of which may be reduced without affecting the corre-

ever, opposes these limits stating that Omnipoint's proposed rule contains a series of definitions that have the effect of allowing Omnipoint, or another operator using a similar wideband signal, to cause harmful interference to the users of adjacent frequency blocks. Accordingly, MCI recommends that the Commission not adopt these limits prior to a thorough industry review, such as through a Joint Technical Committee. MCI agrees that the Commission mightauthorize Omnipoint to use these limits on a waiver basis, subject to the submission of evidence that it has obtained the prior written consent of all potentially affected parties, including those operating, or requesting authorization to operate, in adjacent frequency bands. Motorola notes that the *Errata* to the *MO&O*[118] provides additional clarification and flexibility and may already accommodate Omnipoint's concerns by allowing use of alternative resolution bandwidths for measuring out-of-band emissions. Motorola adds that the clarification requested by Omnipoint may eliminate any uncertainties with respect to the proper measurement standards and that this matter is being addressed in ANSI/IEEE C63-SC7 and the WINTest group of WINForum.

65. Reply comments on this portion of the Omnipoint petition were filed by AT&T Corp. (AT&T), Motorola, and Omnipoint.[119] Omnipoint states that it has modified its proposals for the measurement of out-of-band and spurious emissions in order to directly address MCI's concerns with adjacent channel interference.[120] It argues that industry can not wait to have this rule clarified at some later date since no PCS technology can pass the existing rule within the 5 MHz bands associated with the 10 MHz licenses. Omnipoint adds that its proposal attempts to enable all PCS technologies by including a realistic spectrum emissions mask and a realistic resolution bandwidth measurement.[121] AT&T agrees with Omnipoint's position, and Motorola's comments in support of that position, regarding the procedures for measuring out-of-band emissions and supports the efforts of WINForum and ANSI/IEEE C63-SC7 in addressing this matter. Motorola, while supporting the intent of the Omnipoint proposal in its comments, now expresses concern that it is premature to adopt specific testing language in the rules. Instead, Motorola supports continued consultation with industry groups such as TIA, T1, ANSI/IEEE C63-SC7, and the WINTest group of WINForum before specific testing requirements are detailed. Motorola and Omnipoint subsequently made *ex parte* presentations proposing specific measurement methods for out-of-band emissions.[122] Omnipoint asserts that the current limits are effectively more severe than the levels permitted for out-of-band emissions for unlicensed PCS devices.

66. *Discussion* In adopting standards for wideband licensed PCS systems, the Commission declined to specify a modulation or channelization scheme within a licensee's frequency block. Further, the Commission attempted to adopt technical standards that did not intentionally favor one technology over another. We continue to believe that this flexible approach encourages and facilitates the broadest range of PCS services and devices by permitting licensees to determine the most economic and effective methods of using the spectrum. We also indicated that most parties recognize that PCS is at a nascent stage in its development and that imposition of a rigid technical framework at this time could stifle the introduction of important new technology.[123] Our concern regarding technical standards was to ensure that PCS licensees did not cause harmful interference to existing microwave facilities or to each other.

67. The Commission specified that all emissions appearing outside of the licensee's frequency block must be attenuated by 43 + 10 log (P) dB below the transmitter power.[124] This requirement must be met by licensees and is not specifically aimed at the design of radio equipment. We did so because we sought to provide maximum flexibility to both licensees andp equipment manufacturers as to how they might control emissions outside the licensee's frequency block. For example, a licensee could choose to use equipment that is not designed to meet a stringent out-of-band emissions mask, yet still ensure compliance with our emissions limits by leaving a guard band near the edge of the frequency block.[125] With regard to Omnipoint's

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sponding transmission of information. Spurious emissions include harmonic emissions, parasitic emissions, intermodulation products and frequency conversion products, but exclude out-of-band emissions. Necessary bandwidth is, for a given class of emission, the width of the frequency band which is just sufficient to ensure the transmission of information at the rate and with the quality required under specified conditions. *See* 47 C.F.R. § 2.1.

[118] *See* n.1, *supra*.

[119] *See* Replies of AT&T at 6, Motorola at 4-5, and Omnipoint at 1-5.

[120] In its petition for reconsideration, Omnipoint proposed use of the unlicensed PCS isochronous out-of-band emission mask, which calls for 30 DB suppression for signals up to 1.25 MHz from the band edge, 50 dB suppression between 1.25 MHz and 2.5 MHz from the band edge, and 60 dB suppression beyond. In responding to MCI's concerns, Omnipoint proposed a linear roll-off between 30 dB at the band edge and 50 dB at 1.25 MHz beyond the band edge, and between 50 dB at 1.25 MHz and 60 dB at 2.50 MHz from the band edge.

[121] The changes recommended by Omnipoint to the regulations on emission limits retain the existing standards as applied to spurious emissions. See Omnipoint Reply at 4-5. Omnipoint further described its proposed changes in its *ex parte* presentation to the Commission on September 30, 1994.

[122] *See* letters dated September 30, 1994, from Mr. David E. Hilliard of Wiley, Rein & Fielding to Mr. Julius Knapp, Chief, Authorization and Evaluation Division, OET, and to Mr. William F. Caton, Acting Secretary, FCC. In these letters, Motorola proposes that out-of-band emissions be measured using a resolution bandwidth of approximately one percent of the emission bandwidth of the device under test and integrating the energy over a measurement bandwidth of 1 MHz. Motorola also requests that, during emission measurements, the center of the PCS transmission be displaced from the edge of the channel block by an amount equal to its occupied bandwidth. Omnipoint submitted an *ex parte* filing, dated October 4, 1994, from Mr. Mark J. O'Connor of Piper & Marbury to Mr. William F. Caton, responding to Motorola's proposals. Omnipoint objects to the complexity of the Motorola procedure.

[123] *See PCS Second Report and Order*, 8 FCC Rcd at 7755-56 (paras. 135-137).

[124] *See* 47 CFR Section 24.238; *see also Broadband PCS Reconsideration* at paras. 194-201.

[125] Equipment manufacturers would need to locate fundamental emissions, based on whatever method of channelization is employed, a sufficient distance within a licensee's frequency block to ensure that only spurious emissions, meeting this limit, appear outside of the frequency block.

assertion that equipment will be made unnecessarily costly by the current requirement, we observe that this is not necessarily the case. The equipment can be designed so that it does not operate right up to the edge of a frequency block. We believe that any reduction in capacity of the spectrum by avoiding close proximity to the band edges will be negligible. With regard to Omnipoint's assertion that the unlicensed PCS rules are not as stringent with regard to spurious emissions, and the implicit suggestion that emissions standards for out-of-band emissions by licensed services should be correspondingly eased, we note that standards for unlicensed PCS are only 3.5 dB less stringent within 1.25 MHz of the band edge, an insignificant difference. We find that our basic standard of 43 + 10 log(P) dB is necessary and appropriate to control interference between licensees.[126] Accordingly, we are retaining the current emissions standard. To this extent, Omnipoint's petition is denied.

68. We are persuaded that further clarification is needed with regard to the measurement of emissions immediately outside the necessary bandwidth of the transmitted signal. The current rule states that measurement instrumentation employing a 1 MHz resolution bandwidth shall be employed; however, where emissions within the licensee's frequency block influence the levels of the signals measured outside this block in such a manner to make it appear that these emissions are not in compliance with the standards, alternative measurement techniques may be employed. The commenting parties generally agree that the use of a resolution bandwidth of approximately one percent of the bandwidth of the device under test is appropriate for measuring emissions immediately outside of the frequency block. We are specifically noting this as an appropriate test procedure in the rules. To this extent, Omnipoint's petition is granted. We believe that this action should satisfactorily resolve much of Omnipoint's and the commenters' concerns. The Commission's staff may provide further guidance on this and other measurement matters that may arise, consistent with our current practice.

69. *Unlicensed Devices.* Omnipoint requests that the unlicensed isochronous[127] frame period[128] be changed from 10 milliseconds/X to 20 milliseconds/X where X is a whole number.[129] They argue that this will allow for use of advanced vocoders and promote interoperability between licensed and unlicensed PCS systems that are expected to use advanced vocoder technology. Omnipoint states that the latest generation of vocoders require a 20 millisecond frame period in order to significantly improve throughput and slot time efficiency. Omnipoint states more specifically that in these respects, its 8 kbps codebook excited linear predictive (CELP) type of vocoder meets or exceeds the performance of 32 kbps adaptive pulse code modulation (ADPCM) types that have commonly been promoted for unlicensed equipment. Omnipoint claims their vocoder technology provides a 4: 1 improvement over the 32 kbps vocoder ADPCM technology in throughput efficiency.

70. *Comments.* Motorola opposes Omnipoint's request to change the frame period from 10 milliseconds/X to 20 milliseconds/X and argues that this change would disadvantage narrow band technologies.[130] Motorola contends this disadvantage arises from the relationship between the current "listen before talk" monitoring period of 10 milliseconds and the current frame period definition of 10 milliseconds/X that were chosen to accommodate different technologies and promote spectrum efficiency. Increasing the frame period to 20 milliseconds/X and the monitoring period to 20 milliseconds would double the time required to monitor each frequency/time window. Motorola asserts that performance would be degraded significantly when systems must search a large number of channels. Battery life of portable units would also be reduced. Motorola also asserts that the current frame period will support vocoders that utilize analysis intervals longer than 10 milliseconds. Motorola provides an example of current technology (GSM) that utilizes a vocoder analysis interval longer than its frame period interval.

71. *Replies.* Omnipoint replies that extending the frame period and monitoring period from 10 to 20 milliseconds would result in an additional delay of only one hundredth of a second when accessing a time and spectrum window.[131] They also disagree that extending the frame period and monitoring period will greatly and adversely affect the time required to find an open frequency slot or reduce battery life. AT&T opposes extending the frame period and monitoring period to 20 milliseconds and supports Motorola's arguments.[132] AT&T, however, presents a compromise approach that it believes addresses the concerns of all parties. AT&T proposes that we delete the requirement for systems with 40 or more defined channels to monitor all channels at an access level of 30 dB above thermal noise power. This would relieve large systems of the requirement that they perform repetitive listen before talk monitoring to determine if a clear channel is available, thereby negating the increased access time and battery life issues for larger systems.

72. Extending the maximum frame period of isochronous devices from 10 to 20 milliseconds was addressed in the *Broadband PCS Reconsideration.*[133] Propo-

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[126] We note that several industry technical and standards groups are addressing matters relating to technical standards for PCS both domestically and internationally. At such time as these groups agree upon standards, we may consider appropriate limits on out-of-band emissions also could be considered.

[127] Isochronous devices transmit at a regular interval, typified by time-division voice systems.

[128] Frame period is a set of consecutive time slots in which the position of each time slot can be identified by reference to a synchronizing source. Currently, our rules provide that the frame period of an intentional radiator operating in the 1920-1930 MHz sub-band will be 10 ms/X where X is a positive whole number. *See* § 15.323(e) of the Commission's Rules.

[129] *See* Omnipoint Petition at 3-6.

[130] *See* Comments of Motorola at 13-15. In an *ex parte* filing dated September 30, 1994, Motorola suggested that we clarify the rules regarding the random interval waiting period as it applies to isochronous transmissions. Specifically, Motorola requests that we clarify that any interruption in transmission require application of the uniform random distribution waiting interval before the same time and spectrum window may be reaccessed. We believe this issue can be handled as an interpretation of the rules and no change is necessary in the wording of the requirements.

[131] *See* Reply of Omnipoint at p. 5-8 and Figure 1.

[132] *See* Reply of AT&T at p. 1-6.

[133] *See Broadband PCS Reconsideration* at para. 238.

nents argued at that time that this change would permit the widest range of present and future technologies to operate in the unlicensed band in the most equitable manner, and so would improve the potential for equipment capable of operating in both the licensed and unlicensed spectrum. Opponents argued that lengthening the frame period would necessitate longer channel setup and access times and decrease battery life in portable units. In making our decision to retain 10 milliseconds as the maximum frame period, we stated that a longer frame period could potentially reduce spectrum efficiency and that we were unconvinced that an increase in the frame period would improve the likelihood of compatibility with future technical standards for licensed PCS equipment.

73. *Discussion.* Throughout this proceeding the Commission has continued to support the concept that regulatory impact on present and future potential technologies should be minimized wherever possible in order to provide maximum flexibility for technological innovation. This is especially true when minor adjustments in technical requirements would permit additional technological innovation or alternatives without compromising other implementations. From this perspective, the compromise proposed by AT&T is flawed because it could potentially lead to greatly increased interference between systems competing for limited spectrum. However, analysis by Commission staff of isochronous device operation under the current unlicensed technical requirements has developed a compromise regarding the frame period that will provide for additional technical innovation in the unlicensed spectrum, while not affecting the operation of systems with a 10 millisecond or shorter frame period.

74. This additional flexibility can be achieved by modifying the appropriate rules to permit devices with frame periods of 20 milliseconds to access unlicensed spectrum, and also requiring systems with a 20 millisecond frame period to extend the listen before talk monitoring time to 20 milliseconds. There is little, if any, foreseeable adverse impact on systems that use a 10 millisecond or shorter frame period from systems using a 20 millisecond frame period. By continuing to permit systems with a 10 millisecond or shorter frame period to utilize a monitoring period of 10 milliseconds, they will be unaffected by this rule change. This addresses the concerns raised about channel access times and battery life by continuing to permit system operation consistent with the current rule requirements. Systems with a frame period of 20 milliseconds may be somewhat disadvantaged relative to systems with a shorter frame period because they will have longer channel set-up and access times. The changes in the rules, however, will afford relief to technologies that, because of choice or design constraints, use a frame period of 20 milliseconds and permits those technologies access to the unlicensed spectrum. We are, therefore, revising Sections 15.323(c)(1), 15.323(c)(5) and 15.323(e), that prescribe the channel access requirements, to accommodate systems that use a frame period of up to 20 milliseconds.

**E. PCS Interference to the Broadcast Auxiliary Service.**

75. The Joint Broadcast Parties request that we clarify that we will, *inter alia,* address the potential for interference to the Broadcast Auxiliary Service in the 1990-2110 MHz band by high power PCS base stations in the subjacent 1970-1990 MHz band.[134] Specifically, the Joint Broadcast Parties request that we establish a guard band in the 1970-1990 MHz range, within which only low power mobile units would be allowed to operate.[135] In the alternative, the Joint Broadcast Parties request that we establish a minimum separation distance of two kilometers between PCS base stations and broadcast auxiliary receive sites.[136]

76. *Comments.* Five commenters addressed the Joint Broadcast Parties' petition. Commenters argue that the Joint Broadcast Parties' analysis of the likelihood of interference is premised upon worst case conditions, especially in assuming that a PCS base station will be directly between the broadcast auxiliary transmitter and receiver, that the PCS station will necessarily be operating at the maximum allowable power, and that a distance of up to two kilometers represents immediate proximity.[137] Further, they state that the suggested guard band would have the effect of imposing use restrictions on PCS Blocks C and F that would decrease the value of those blocks, and necessitate design of PCS handsets more complex and expensive than are necessary under the current plan. Commenters also claim that the proposed restrictions work against general design principles, which indicate that the lower power transmitter should operate on the lower frequency. Commenters also argue that the proposed guard band would create "technological islands" that would interfere with the interoperability of PCS, to the especial detriment of designated entities and entrepreneurial licensees.[138] Finally, our current rules on interference and out-of-band emissions are sufficient to protect broadcast auxiliary operations, according to commenters.[139]

77. *Replies.* The Joint Broadcast Parties state that those opposing its initial petition for stricter interference protections make no serious effort to quantify the actual risk of interference, and reassert that the BAS needs more protection from potential interference by PCS.[140] Motorola Inc. (Motorola) reiterates its opposition to the establishment of a guard band.[141]

78. *Discussion.* MSTV's concerns arise from two actions in the *PCS Broadband Reconsideration:* the increased maximum permissible power approved for PCS base stations, and the allocation to PCS of a portion of spectrum that is internationally designated for MSS. The increased power limit, MSTV asserts, carries with it an increased potential for interference to BAS users in the adjacent band, while

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[134] *See* Joint Broadcast Parties Petition at 5.

[135] *See id.,* Attachment at 1.

[136] The remainder of the Joint Broadcast Parties' petition addresses issues of spectrum allocation and service relocation that do not bear on this proceeding. *See id.,* Attachment at 1.

[137] *See* APC Comments, Exhibit 2 at 2-3; Motorola Comments at 5-7; Northern Telecom Comments at 5-6.

[138] *See* APC Comments, Exhibit 2 at 1-2; Northern Telecom Comments at 4-5; PCIA Opposition at 2.

[139] *See* Comsat Comments at 3; Motorola Comments at 7-8; Northern Telecom Comments at 6.

[140] *See* Joint Broadcast Parties Reply at 3-5.

[141] *See* Motorola Reply at 1-3.

the revised allocation plan renews BAS users' concern that their operations on the 1990-2110 MHz band not be compromised by subsequent MSS allocation decisions.

79. As to the potential for increased interference to BAS users, including ENG applications, the record does not persuade us that protective action beyond the measures adopted in the *PCS Broadband Reconsideration* is necessary. There, we amended our rules to indicate that spurious emission limits apply to all frequencies outside the block employed by a PCS licensee, and clarified compliance testing procedures.[142] We also amended our rules to specify the resolution bandwidth of measuring instruments. These rules apply both to the transmitter and the operating system, as installed by the licensee, and the Commission retains the authority to require additional attenuation when emissions cause harmful interference to other users of the RF spectrum.[143]

80. To support its argument for measures more extensive than these existing provisions, MSTV submits an engineering exhibit premised on worst case assumptions, which provides a wholly insufficient basis from which to conclude that present interference protection measures are so inadequate as to require substantial additional safeguards. We are not persuaded that the worst case scenario MSTV presents should be the appropriate overall standard for evaluating interference protection. In this case, in addition to MSTV's failure to demonstrate more than the merest possibility of interference, commenters have identified, and MSTV does not dispute, significant technical and competitive burdens that would be imposed on PCS licensees in the 1970-1990 MHz band if use of that band were constrained as MSTV proposes. MSTV does not dispute that limiting PCS licensees in that band to mobile use would result in a system configured at odds with customary engineering practice, and so would require distinctive handsets that, moreover, would not be compatible for use with more conventionally configured PCS systems. We view such targeted constraints on licensee's flexibility to use a particular PCS spectrum block as measures to be considered only in extreme circumstances, which MSTV has not demonstrated here. We are confident that the standards already established in this proceeding will serve to protect the broadcast auxiliary service from possible PCS base station out-of-band emissions.[144] We note that, apart from specific attenuation standards, we have authority under Section 24.238(b) of our rules to require any PCS base station which causes interference to other radio services to attenuate its out-of-band emissions substantially. For these reasons, we deny MSTV's petition.

81. As to the revised allocation plan, and possible allocation actions in the MSS proceeding, MSTV asks that in future proceedings the Commission place priority on a spectrum solution for MSS that does not involve relocation or impairment of BAS operations, and that if relocation is required, various measures be implemented toward a reasonable transition period and compensation to broadcasters for relocation costs. These concerns will be fully considered as part of the Commission's impending review of MSS allocation alternatives, but need not be reviewed in this further reconsideration context.

**F. Secondary Allocation for MSS**

82. CELSAT, INC. (Celsat) petitions for review on spectrum allocation issues. Celsat requests that the 1970-1990 MHz band be allocated on a secondary basis and that the 2160-2180 MHz band be allocated on a primary basis for domestic Mobile-Satellite Service (MSS) use, arguing that its technology would allow it to share these bands with both fixed microwave systems and new terrestrial PCS systems.[145]

83. Celsat proposes a domestic MSS or hybrid satellite system that would be licensed to provide space-based PCS services nationwide as long as it did not interfere with the operation of any terrestrial PCS system licensed in either PCS Frequency Blocks F or C.[146] Celsat states that its proposal would be spectrum efficient, and that a single handset could access both terrestrial PCS service in served areas and MSS service in areas not served by terrestrial PCS.[147] Celsat states that participating PCS licensees would attain nationwide coverage upon the launch of a single MSS satellite and that this coverage would provide these licensees an immediate competitive advantage over other PCS and cellular licensees.[148] It states that these bands are the only spectrum that is earmarked both domestically and internationally for both ground and space mobile services and thus are ideal for a hybrid space/ground PCS system.[149] Celsat further states that its proposal would cause no interference if licensees in Blocks C and F use the 1970-1990 MHz band for mobile unit transmission. It therefore requests a secondary MSS allocation of this band, and urges PCS licensees in this band to choose the CDMA multiplexing scheme so that MSS and PCS services can efficiently share the band.[150] Celsat's proposal requires not only the secondary MSS allocation at 1970-1990 MHz, but also a primary MSS allocation at 2160-2180 MHz.[151]

84. The 1992 World Administrative Radio Conference (WARC-92) adopted the following allocations for MSS: Region 2 – 1970-1980 and 2160-2170 MHz primary, 1930-1970 and 2120-2160 MHz secondary; Worldwide – 1980-2010 and 2170-2200 MHz primary. In the *Second*

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142 *PCS Broadband Reconsideration* at paras. 197-199.

143 *See id.* at para. 200; Appendix A at Sec. 24.238(b).

144 We note that the standard for attenuation of out-of-band emissions to which PCS base stations must adhere is currently stricter than the standard for microwave licensees in the same band. *See* 47 C.F.R. § 94.71.

145 *See* Celsat Petition at 1-4. Because the MSS system would be transmitting to its mobiles in the 2160-2180 MHz band, there would be no interference to the PCS mobiles from MSS satellite transmissions. Celsat claims that the potential interference from MSS mobile transmissions received at PCS base stations would be prohibited by not assigning a potentially interfering frequency to a mobile user whenever it is within range of a microwave or PCS system.

146 PCS Block F is 1890-1895 and 1970-1975 MHz; PCS Block C is 1895-1910 and 1975-1990 MHz.

147 This ability to use a single handset to access both PCS and MSS systems assumes that PCS licensees would employ a handset using a CDMA multiplexing scheme compatible with Celsat's design.

148 *See* Celsat Petition at 6.

149 *See id.* at 2.

150 *See id.* at 5-6.

151 *See id.* at 7.

*Report and Order* in the instant proceeding, we allocated the 1850-1970 MHz, 2130-2150 MHz and 2180-2200 MHz bands to terrestrial PCS and reserved the 1970-1990 and 2160-2180 MHz bands for possible MSS use. On reconsideration, we decided to allocate 1850-1990 MHz for PCS, and to reserve 2110-2150 MHz and 2160-2180 MHz for emerging technologies, including MSS.

85. *Comments.* Two commenters addressed the issues raised by Celsat and the Joint Broadcast Parties, generally opposing any change to our current rules.[152] As an initial matter, COMSAT Corporation (Comsat) argues that the petition of Celsat is not within the scope of this proceeding, because we have indicated that we will address this issues in an upcoming MSS allocation proceeding.[153]

86. With regard to Celsat's proposed allocations for MSS, commenters assert that this proposal would add uncertainty to the quality of PCS services in this band, to the disadvantage of designated entities and entrepreneurial licensees,[154] and would interfere with the ongoing international negotiations regarding MSS issues.[155] Commenters state that the place to consider this issue is the upcoming MSS proceeding.[156]

87. *Replies.* American Mobile Satellite Corporation (AMSC) joins Comsat in urging the Commission to address spectrum issues in an upcoming MSS proceeding, and urged us to begin this proceeding as soon as possible.[157]

88. *Discussion.* We agree with commenters who state that this proceeding is not the appropriate place to consider the multiple implications of spectrum allocations for MSS. The Commission is scheduled to release a Notice of Proposed Rule Making in a separate MSS proceeding prior to the December 1994 broadband PCS auction, and that order will consider the issue of authorizing satellite operations in conjunction with broadband PCS.

### G. ONA Implementation for PCS

89. Point asks that the Commission require PCS networks to utilize Open Network Architecture, asserting this would guarantee competition among equipment suppliers and reduce the cost of constructing networks.[158] MCI in its comments characterizes Point's request as a plea for the Commission to assert authority over equipment manufacturers, and asserts that the marketplace can best determine the desirability of ONA or other network architecture schemes.[159] No reply comments were filed.

90. The elements of an Open Network Architecture regulatory system necessarily reflect the characteristics of the network environment in which those elements are applied. Apart from Point's very general request and a few sentences of MCI's response, the record in this proceeding is nearly devoid of any discussion of the complex technical and operational issues involved. Such a record provides a wholly inadequate basis for assessing the merits of ONA in the wireless telecommunications marketplace. We will therefore deny Point's request, but this action does not preclude Point or other interested parties from filing a more specific and well developed ONA proposal in the form of a petition for rulemaking.

## IV. CONCLUSION

91. The adoption of a *Memorandum Opinion and Order* in the Emerging Technology proceeding a month ago advanced our consideration of transition issues.[160] Today we have amended our service rules in this order to better facilitate the introduction of broadband PCS services to the public. Additionally, we are conducting ongoing consultations with foreign governments to ensure that international coordination requirements for this service will be completed as rapidly as possible. As previously announced, we intend to begin auctioning broadband PCS licenses on December 5, 1994.[161]

## V. ORDERING CLAUSES

92. ACCORDINGLY, IT IS ORDERED, that the petitions for reconsideration addressed in this order ARE GRANTED to the extent described above, and DENIED in all other respects.

93. IT IS FURTHER ORDERED, that Parts 2, 15, and 24 of the Commission's Rules ARE AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register, except that amendments to 47 C.F.R. Section 24.204 as specified in Appendix A SHALL BE EFFECTIVE immediately upon publication in the Federal Register.[162] This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

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[152] Commenters on Celsat's petition were APC and COMSAT Corporation (Comsat).

[153] *See* Comsat Comments at 2.

[154] *See* APC Comments, Exhibit 2 at 4-5.

[155] *See* Comsat Comments at 5-6.

[156] *See* APC Comments, Exhibit 2 at 5; Comsat Comments at 8.

[157] *See* AMSC Reply.

[158] *See* Point Petition at 5-6.

[159] *See* MCI Comments at 4-5.

[160] *See Memorandum Opinion and Order,* ET Docket No. 92-9, 9 FCC Rcd 1943 (1994).

[161] *See Public Notice,* Commercial Mobile Radio Service Information: Auction Notice and Filing Requirements for 99 MTA Licenses Located on the A and B Blocks for Personal Communications Service in the 2 GHz Band, Report No. AUC-94-04, Auction No. 4, released September 19, 1994.

[162] Amendments to Section 24.204 ease existing regulatory restrictions on entities with non-controlling, attributable cellular interests by providing them an opportunity to participate in broadband PCS auctions from which they previously were barred, and provides all parties with greater certainty about the post-auction divestiture requirements of our cellular/PCS cross-ownership rules. These benefits will be compromised unless the Section 24.204 amendments become effective immediately upon publication in the Federal Register, as the deadline for filing applications to participate in the initial broadband PCS auction is October 28, 1994, less than two weeks from the adoption date of the instant order. Thus, there is good cause to order the amendments to take effect upon Federal Register publication. *See* 5 U.S.C. §§ 553(d)(1), (d)(3).

William F. Caton
Acting Secretary

**Appendix A: Final Rules**

Parts 2, 15, and 24 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

**PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS**

1. The authority citation for Part 2 continues to read as follows:

**AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303 and 307, unless otherwise noted.**

2. Subpart B is amended by revising Section 2.106, the Table of Frequency Allocations, as follows:

a. In Column (4) of the 1850-1990 MHz band, add US331.

b. In Column (4) of the 2110-2200 MHz band, delete US331.

c. In Column (7) of the 1850-1990 MHz band, delete EMERGING TECHNOLOGIES.

**PART 15 -- RADIO FREQUENCY DEVICES***

1. The authority citation continues to read as follows:

**AUTHORITY: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.**

2. Paragraphs 15.323(c)(1) and (5) and 15.323(e) are revised to read as follows:

**§ 15.323 Specific requirements for isochronous devices operating in the 1920-1930 MHz sub-band.**

* * * * *

(c) * * *

(1) Immediately prior to initiating transmission, devices must monitor the combined time and spectrum windows in which they intend to transmit for a period of at least 10 milliseconds for systems designed to use a 10 millisecond or shorter frame period or at least 20 milliseconds for systems designed to use a 20 millisecond frame period.

* * * * *

(5) If access to spectrum is not available as determined by the above, and a minimum of 40 duplex system access channels are defined for the system, the time and spectrum windows with the lowest power level below a monitoring threshold of 50 dB above the thermal noise power determined for the emission bandwidth may be accessed. A device utilizing the provisions of this paragraph must have monitored all access channels defined for its system within the last 10 seconds and must verify, within the 20 milliseconds (40 milliseconds for devices designed to use a 20 millisecond frame period) immediately preceding actual channel access that the detected power of the selected time and spectrum windows is no higher than the previously detected value. The power measurement resolution for this comparison must be accurate to within 6 dB. No device or group of cooperating devices located within 1 meter of each other shall occupy more than three 1.25 MHz channels during any frame period. Devices in an operational state that are utilizing the provision of this section are not required to use the search provision of (b) above.

* * * * *

(e) The frame period (a set of consecutive time slots in which the position of each time slot can be identified by reference to a synchronizing source) of an intentional radiator operating in these sub-bands shall be 20 milliseconds or 10 milliseconds /X where X is a positive whole number. Each device that implements time division for the purposes of maintaining a duplex connection on a given frequency carrier shall maintain a frame repetition rate with a frequency stability of at least 50 parts per millions (ppm). Each device which further divides access in time in order to support multiple communication links on a given frequency carrier shall maintain a frame repetition rate with a frequency stability of at least 10 ppm. The jitter (time-related, abrupt, spurious variations in the duration of the frame interval) introduced at the two ends of such a communication link shall not exceed 25 microseconds for any two consecutive transmissions. Transmissions shall be continuous in every time and spectrum window during the frame period defined for the device.

**PART 24--PERSONAL COMMUNICATIONS SERVICES**

1. The authority citation for Part 24 continues to read as follows:

**AUTHORITY: 47 U.S.C. Sections 154, 301, 302, 303, and 332, unless otherwise noted.**

2. Section 24.204 is amended by revising text immediately following the semi-colon in the end of the first sentence of paragraph (f), and by adding new sentences at the end of that paragraph and of paragraph (f)(3)(ii) to read as follows:

**§ 24.204 Cellular eligibility.**

* * * * *

(f) * * * Provided, however, that these divestiture procedures shall be available only to: parties with controlling or attributable ownership interests in cellular licenses where the CGSA(s) covers 20 percent or less of the PCS service area population; and parties with non-controlling attributable interests in cellular licenses, regardless of the degree to which the CGSA(s) covers the PCS service area population. For purposes of this paragraph, a "non-controlling attributable interest" is one in which the holder has less

than a fifty (50) percent voting interest and there is an unaffiliated single holder of a 50 percent or greater voting interest.

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(3)(i) * * * The trustee must divest the property within six months from grant of license.

* * * * *

3. Section 24.238 is amended to read as follows:

**§ 24.238** ***Emission limits.***

(a) On any frequency outside a licensee's frequency block, the power of any emission shall be attenuated below the transmitter power (P) by at least 43 + 10 log (P) dB.

(b) Compliance with these provisions is based on the use of measurement instrumentation employing a resolution bandwidth of 1 MHz or greater. However, in the 1 MHz bands immediately outside and adjacent to the frequency block a resolution bandwidth of at least one percent of the emission bandwidth of the fundamental emission of the transmitter may be employed. The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated at least 26 dB below the transmitter power.

(c) When measuring the emission limits, the nominal carrier frequency shall be adjusted as close to the licensee's frequency block edges, both upper and lower, as the design permits.

(d) The measurements of emission power can be expressed in peak or average values, provided they are expressed in the same parameters as the transmitter power.

(e) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

## Appendix B

## PARTIES

**Petitioners**

1. Association for Maximum Service Television, Inc. and Capital Cities/ABC, Inc., CBS Inc., Fox, Inc. & Fox Broadcasting Stations, Inc., the National Association of Broadcasters, Inc., National Broadcasting Company, Inc., Public Broadcasting Service, the Radio-Television News Directors Association, and the Society of Broadcast Engineers (collectively, "MSTV")

2. Association of Independent Designated Entities (AIDE)

3. CELSAT, INC. (Celsat)

4. Cellular Telecommunications Industry Association (CTIA)

5. Comcast Corporation (Comcast)

6. Omnipoint Corporation (Omnipoint)

7. Personal Communications Industry Association (PCIA)

8. Point Communications Company (Point)

9. Puerto Rico Telephone Company (PRTC)

10. Spatial Communications, Inc. and ArrayComm, Inc. (SCI/ArrayComm)

**Opposing and Commenting Parties**

1. American Personal Communications (APC)

2. BellSouth Corp., BellSouth Telecom. Inc., BellSouth Cellular Corp. (BellSouth)

3. Celeritek, Incorporated (Celeritek)

4. COMSAT Corporation (Comsat)

5. McCaw Cellular Communications, Inc. (McCaw)

6. MCI Telecommunications Corporation (MCI)

7. Motorola, Inc. (Motorola)

8. Northern Telecom Inc. (Northern Telecom)

9. Pacific Bell Mobile Services (PacBell Mobile)

10. Pegasus Communications, Inc. (Pegasus)

11. Personal Communications Industry Association (PCIA)

12. Rural Cellular Association (RCA)

13. Utilities Telecommunications Council (UTC)

14. Sprint Corporation (Sprint)

**Replying Parties**

1. American Mobile Satellite Corporation (AMSC)
2. Ameritech
3. APC
4. AT&T
5. CTIA
6. GTE Service Corporation (GTE)
7. Motorola
8. MSTV
9. Omnipoint
10. PacBell Mobile
11. PCIA
12. PRTC
13. UTAM, Inc. (UTAM)

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Andrew R. Yoder NAL/Acct. No. 215LR0001
Chambersburg, Pennsylvania

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 10, 1994; Released: March 11, 1994**

By the Commission:

## I. INTRODUCTION

1. The Commission has before it a Motion for Stay, a Motion To Accept Late-Filed Pleading and Request for Waiver of 47 C.F.R. § 1.115(f)(1), and an Application for Review filed by Andrew R. Yoder, through counsel, in response to a Forfeiture Order issued to Mr. Yoder on July 2, 1992. For the reasons stated below, we dismiss his Motion for Stay, grant his Motion To Accept Late-Filed Pleadings and Request for Waiver of 47 C.F.R. § 1.115(f)(1), and deny his Application for Review.[1]

## II. BACKGROUND

2. On May 21, 1992, the Laurel, Maryland, Office of the Field Operations Bureau issued a Notice of Apparent Liability (NAL) for Monetary Forfeiture in the amount of $17,500 to Mr. Yoder pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), for willful and repeated violation of Section 301 of the Act, 47 U.S.C. § 301, and Section 15.29 of the Commission's Rules, 47 C.F.R. § 15.29. Commission monitoring activities and investigations disclosed that Mr. Yoder was operating a broadcast station without an instrument of authorization and had refused to allow an FCC official to inspect the "pirate" station.[2] On July 2, 1992, the Laurel Office issued a Forfeiture Order to Mr. Yoder assessing a $17,500 forfeiture against him in this matter. Mr. Yoder filed his application for review and related pleadings on December 17, 1992.[3]

## III. DISCUSSION

3. Because no other parties are involved, and in order to permit a fuller explanation of the Bureau order, we will accept the late-filed application for review and address the arguments raised in it.[4]

4. In his Application for Review of the Forfeiture Order, Mr. Yoder argues that review is necessary to avoid a violation of his due process rights under Section 555(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 555(b). He asserts that given the possible criminal sanctions and the high amount of the forfeiture, the agency should have advised him to retain an attorney. For this reason, Mr. Yoder argues, the public interest demands that the Commission vacate the Bureau's decision. We reject this contention. Section 555(b) of the APA does not impose any duty on an agency to advise people regarding representation; it simply provides that a person who is compelled to appear before an agency is entitled to be accompanied, represented, or advised by counsel. The FCC has no obligation to inform parties to FCC proceedings of their right to be represented by counsel. *Compare Miranda v. Arizona*, 384 U.S. 436 (1966).

5. We next address Mr. Yoder's argument that the Bureau failed to establish the necessary evidentiary basis for the forfeiture. Mr. Yoder contends that the Bureau's reliance on evidence it has gathered regarding "Radio USA" (a pirate radio station) operations is inappropriate because the Bureau has not established that he was the operator or that the "station" which the FCC investigators intercepted was being operated by the same individual in all instances. Mr. Yoder argues that the use of evidence regarding his presence at a campground at the time transmissions from an illegal radio station were intercepted to link him with operations which were later intercepted from his parent's home was improper use of "hearsay" testimony. He argues that use of this "hearsay" and circumstantial evidence deprived him of an opportunity to confront witnesses against him.[5]

6. We reject Mr. Yoder's argument that the Commission's finding of liability was based on unacceptable hearsay evidence. The Commission's finding of liability was based on documented evidence obtained with each transmission from direction finding techniques and voice identification which are accepted evidentiary methods. The same FCC inspector intercepted the transmissions at issue. Thus, the inspector to whom Mr. Yoder refused entrance and permission to inspect the station on February 23, 1992, was the same inspector who traced the other transmissions, including the transmissions at the campground. Uncontroverted evidence obtained from the campground, such as business records, and discussions with campground personnel, corroborate Mr. Yoder's presence in the

[1] Since we are granting the Applicant's Motion to Accept the Late-Filed Pleading, we do not address any arguments regarding a review based on the Commission's authority under Section 1.108, 47 C.F.R. § 1.108.

[2] The term "pirate radio station" is commonly used to refer to an unlicensed or unauthorized broadcast-type of radio station operation with programing intended for reception by the general public. Illegal "pirate" stations normally operate on broadcast frequencies (AM, FM or international shortwave) or on frequencies assigned to other radio services or for governmental use.

[3] Mr. Yoder also filed an intermediate letter, which appears to have been superseded by the application for review and is thus not separately discussed here.

[4] We dismiss the request for stay pending our review as moot in light of the order on review here.

[5] In the Notice of Apparent Liability which was issued to Mr. Yoder, the Bureau cited information showing that Mr. Yoder had been present at various locations from which intercepts had been made of "Radio USA" operations. Although some of this evidence can correctly be termed circumstantial, it is the totality of this evidence which forms part of the basis for the Commission's decision.

campground during the time of the transmissions. Moreover, from his review of tapes made of the "Radio USA" transmission, as well as the tapes from September 28, 1991, October 11 and 12, 1991 and February 22 and 23, 1992, the inspector confirmed in each instance that the voice was the same voice of the man who refused him entry to inspect the station on February 23, 1992, -- Mr. Yoder.[6]

7. We also reject Mr. Yoder's argument that the FCC inspector's request to inspect the station was unreasonable. At 3:10 a.m. EST, the inspector requested access to the premises for the purpose of inspecting the radio station equipment which was operated between 2:30 a.m and 3:05 a.m. EST. Mr. Yoder was apparently operating a radio station without a license. Section 303(n) of the Act grants authority to inspect, *inter alia*, radio stations required to be licensed by the Act. 47 U.S.C. § 303(n).[7] *See also* 47 C.F.R. § 73.1225. Thus, Mr. Yoder was engaged in an activity for which the FCC had authority to inspect. The Commission views the time of operation of a radio station as a reasonable time within which to request an inspection. Further, it is reasonable to request such access to the premises from which the broadcast station is operating. *See* 47 C.F.R. § 73.1225(a) (broadcast stations to be made available for inspection "at any time it is in operation.") Commission investigators traced the February 23, 1992, radio transmissions to their source: the home of Mr. Yoder's parents. At the time the transmissions were made, lights were on in the home, and Mr. Yoder answered the door when investigators knocked. Mr. Yoder was subject to inspection during operation, and had an opportunity to make the radio equipment available for inspection, but refused. For that reason, we reject Mr. Yoder's argument that the amount of the forfeiture should be lowered to exclude the portion attributable to his refusal to allow the inspection.

8. Mr. Yoder also contends that the Bureau failed to provide him with notice of the specific dates on which the Section 301 violations (unlicensed operations) were alleged to have occurred. We note that paragraphs 4 through 7 of the NAL list specific dates and times for each of the violations alleged.

9. Finally, Mr. Yoder raises arguments regarding due process and APA requirements. He argues that the Commission violated his due process rights by denying him an effective opportunity "to make meaningful comment" prior to issuance of the forfeiture. He also urges mitigation or withdrawal of the forfeiture arguing that the amount levied ($17,500) so varied from forfeiture amounts levied in various other Commission actions for similar violations that it was arbitrary and capricious.

10. Mr. Yoder appears to be arguing that he should have been afforded a full hearing. Section 503(b)(4)(C) of the Communications Act, however, allows the Commission to issue forfeitures without a hearing, using the notice of apparent liability written response procedures. 47 C.F.R. § 1.80(e). Moreover, since this type of forfeiture proceeding is ultimately subject to a trial de novo in a court pursuant to Section 504(a) of the Act, 47 U.S.C. 504(a), that represents his procedural due process right to a hearing in such forfeiture matters. *See* Metromedia, Inc., 38 RR 2d 785, 798 (1976).

11. We also reject his contention that the amount of the forfeiture is arbitrary and capricious. Mr. Yoder was assessed a forfeiture of $10,000 for operating an unlicensed station and $7,500 for failure to permit inspection. The Bureau was guided by the Commission's *Policy Statement* in establishing the base amount of the forfeiture and in applying upward and downward adjustment criteria. *Policy Statement, Standard for Assessing Forfeitures*, 6 FCC Rcd. 4695 (1991), *modified in part on recon.*, 7 FCC Rcd 5339 (1992), *petition for review pending subnom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). *See also Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Although non-binding, the *Policy Statement* provides guidance for treating similar violations in a consistent manner. *See 1991 Policy Statement*, 7 FCC Rcd 5339 (1992). The cases cited by Mr. Yoder as demonstrating significantly lower amounts for purportedly similar violations, with one arguable exception, present such different facts, circumstances, and legal issues as to be inapposite.[8] Although the *Bailey* case, *In the Matter of John G. Bailey*, (July 16, 1992), involved the unlicensed operation of a

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[6] On February 22, 1992, the direction finding device located the station "Radio USA" at 5:39 p.m. EST on 7415 kHz and fixed its position in the vicinity of Accident, Maryland. A direction finding vehicle was dispatched, but the transmissions stopped prior to the vehicle's arrival in western Maryland. The vehicle remained in the area overnight. At 2:30 a.m. the next morning , "Radio USA" was again on the air; the df vehicle was alerted and the source of the transmissions was identified at 3:05 a.m. EST as the home of Mr. Yoder's parents in Springs, Pennsylvania, which is near Accident, Maryland. The lights were on at the residence and Mr. Yoder's car, the same one seen leaving the campground in Churchville, VA, was in the driveway. At 3:10 a.m. EST the transmissions stopped and the FOB investigator knocked at the door. Mr. Yoder greeted the inspector and confirmed that he and his father, who was asleep, were the only males in the house. The FOB inspector requested, but was denied access to the radio station by Mr. Yoder.

[7] Section 303(n) of the Act grants the Commission authority to inspect all radio installations which are required to be licensed to ascertain whether in construction, installation, and operation they conform to the requirements of Commission rules and regulations or any Act, treaty or convention, and the conditions of the license or other instrument of authorization under which they are constructed, installed or operated. 47 U.S.C § 303(n).

[8] We note that the cases cited by Mr. Yoder are distinguishable from the instant case. In *Orient Express, 7 FCC Rcd 6592 (1992)*, for example, the Commission applied forfeiture guidelines in effect prior to adoption of its *1991 Policy Statement*. Moreover, the facts varied significantly from the instant case because in *Orient* the operator of a business radio service had purchased radio equipment from the previous operator and erroneously assumed that transfer of ownership papers had been completed. Unlike the instant case which involves unlicensed operations, the other cases cited involved *licensed* operators who either operated on the wrong frequency, or who caused interference by failing to follow proper amateur operating practices. (e.g. *In the Matter of Whatley, In the Matter of Brantley,*. None of the cases cited involved operators who attempted to elude Commission detection of the transmission by changing the situs of operations. Further, the Commission made no finding that the violations were repeated, and in some cases reduced the amount of the forfeiture based on the licensee's or respondent's history of overall compliance.

Mr. Yoder also argues that, as in *Nu-Page Winder*, remedial action and the fact that no injury occurred as a result of the violation should serve as a basis for mitigating the amount of the forfeiture. This case did not involve a forfeiture proceeding. Further, the Commission considered the actions of the parties in correcting the interference because the complaint involved

station, the Field Operations Bureau initially sought to impose a $2,000 forfeiture rather than the $8,000 base forfeiture amount based on its assessment that the violation was minor given all circumstances, including the fact that the individual was a first time and one-time only violator. The Bureau further considered Mr. Bailey's response, supported by documentation of inability to pay. We recognize that as in *Bailey* and some of the cases cited in footnote 8, Mr. Yoder is also a first time offender. However, because Mr. Yoder is the author of a book indicating his knowledge and familiarity with this area, *see Pirate Radio Stations* (1990), as an equitable matter we do not believe it is appropriate for him to receive a downward adjustment for no history of prior violations.

12. Finally, we reject Mr. Yoder's argument that the Bureau lacked authority to issue a forfeiture for violations of the Act rather than specific rule provisions. The rules provide that the Bureau Chief and Engineer in Charge at each of the Commission's field offices may issue forfeitures for violations of the Act as well as rule violations. *See* 47 C.F.R. §§ 0.311, 0.314, 1.80. He also appears to have misread or misunderstood the language of Section 503(b) of the Act. Mr. Yoder argues that the Bureau violated its own procedures under Section 1.80(d) by failing to issue a citation prior to issuing the Notice of Forfeiture. Section 503(b) and Section 1.80(d) specify that forfeitures may be issued to non-licensees engaged in activities for which a license is required without the need for a prior citation or meeting with a Commission official. Mr. Yoder was engaged in such activity and, therefore, did not warrant a prior notice. Regarding the sufficiency of the notice given to Mr. Yoder, issuance of a Notice of Apparent Liability fulfills all requirements for a notice, since it advises the recipient of the Commission's intent to issue a forfeiture order and states the legal and factual bases for the alleged violations.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115, we GRANT Mr. Yoder's Motion To Accept-Filed Pleading, we DISMISS his Motion for Stay, and DENY his Application for Review.

14. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), that Mr. Andrew R. Yoder SHALL FORFEIT the amount of $17,500 within thirty (30) days of the release of this ORDER. Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission. The remittance should be marked "Acct. No. 215LR0001" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

co-channel users of the business service. Section 90.173(b), the Rule governing use of the shared frequency also imposes a requirement that users cooperate to resolve the occasional interference problems that arise from use of shared frequencies. *See e.g., In re Lee Richter d/b/a/ Nu Page of Winder, 6 FCC Rcd 7565 (1991).* That scenario is in contrast to the instant case.B

Before the

**FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

FCC 94D-13

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| In re Applications of | ) | MM DOCKET NO. 93-87 |
| | ) | |
| RAYMOND W. CLANTON | ) | File No. BPH-911216MC |
| | ) | |
| LOREN F. SELZNICK | ) | File No. BPH-911216MD |
| | ) | |
| For Construction Permit for a New FM Station on Channel 279A In El Rio, California | ) | |

Appearances

Jerrold Miller, Esq. on behalf of Raymond W. Clanton; Robert Thompson, Esq. on behalf of Loren Selznick; and Paulette Laden, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: November 3, 1994 ; Released: November 10, 1994

PRELIMINARY STATEMENT

1. By Hearing Designation Order, 8 FCC Rcd 2624 (1993), ("HDO"), the Commission designated for hearing the mutually exclusive applications of Raymond W. Clanton ("Clanton") and Loren F. Selznick ("Selznick") for a construction permit for a new FM station on Channel 279A in El Rio, California, on the standard comparative issues.

2. By Memorandum Opinion and Order, FCC 93M-625, released September 30, 1993, the Presiding Judge added the following issues against Selznick:

(I) To determine whether Selznick falsely certified in her application that she was

financially qualified, and if so, the effect thereon on her qualifications to become a Commission licensee;

(II) To determine whether Selznick misrepresented facts or lacked candor in certifying that she was financially qualified in her original application and if so, the effect thereon on her qualifications to become a Commission licensee; and

(III) To determine whether Selznick is financially qualified to construct her station and operate it for three months without revenue, and if not, the effect thereon on her qualifications to become a Commission licensee.

3. Both the burden of going forward and the burden of proof on these issues were placed on Selznick.

4. An evidentiary hearing session on the issues added against Selznick was held January 12, 1994. The record was closed January 12, 1994. See FCC 94M-28, released January 18, 1994.

## Findings of Fact

### Basic Qualification Issues

### False Certification of Financial Qualification/Misrepresentation - Selznick

5. Selznick worked as an attorney for the law firm of Breed, Abbott & Morgan in New York, since 1987. She has primarily been under the tutelage of Joseph P. Dailey, ("Dailey") a former partner in the firm. They became personal friends as well as co-workers. Dailey left the firm in mid-1991, but continued to work with Selznick on matters handled by the firm (Selznick Ex. 4).

6. In the late summer of 1991, after returning to New York from a trip to California in which she unsuccessfully looked for radio stations to purchase, Selznick became aware of the opportunity to apply for the El Rio channel. She spoke with Dailey about the advisability of applying for the radio station (Id.). Dailey thought it was a great idea (Id.).

7. In proceeding toward preparation of the application, Selznick developed a construction and operating budget for her proposed station. She consulted with Dean Heinen, an engineer, who provided estimated costs of

equipment and its installation. Selznick's cost estimate for construction and first three months operation was $360,070 (Id.).

8. At hearing Selznick was unable to state whether Dean Heinen's estimates included shipping and sales taxes. She was unaware of the sales tax rate in California when she filed her application (Tr. 89). Selznick's estimate omitted the Commission's $6,760 hearing fee. She also failed to account for the fees to file the application for license ($115) and the studio transmitter license application ($85) (Tr. 90-91).

9. Selznick proposes to move from New York to California to oversee the entire construction of the station and to operate it thereafter (Selznick Ex. 2). Her budget estimate omitted the cost of relocating as well as her living expenses in California during the period of construction and three months operation. She does not plan to pay herself a salary during the first three months of station operation (Tr. 104).

10. When questioned on these omissions, Selznick testified that she knew that at the time that she filed that her installation budget was very high -- "It's in the $80,000 to $90,000 range and I was told before I put in my application that that was extraordinary, but there was no need to change it. I could use that money to apply to other things like legal expenses or fees." (Tr. 90-91).

11. In need of financing to cover her estimated costs, Selznick contacted Derrick Cephas, a former attorney at her law firm, who was part of a group which owned and operated radio stations. Cephas indicated to Selznick that his group was interested in providing the financing. However, Selznick had not reached an arrangement with Cephas group for the financing by November 1991, shortly before the filing deadline. She mentioned her lack of a financial commitment to Dailey telling him that her estimate of the station's construction and start up costs was slightly more than $350,000 (Selznick Ex. 4).

12. Selznick asked Dailey if he was still interested in loaning the needed funds (Selznick Ex. 4, p. 7). She was assured by Dailey that he would loan the funds (Id.). She then informed him that, as her proposed lender, he would have to have approximately $360,000 in "net liquid assets." (Id.). Dailey immediately pulled up his current balance sheet on his computer and, with Selznick on the phone from New York, they orally reviewed his balance sheet item-by-item (Id.). They concluded that, under generally accepted accounting principles, his cash, his partnership profits due and his partnership inventory interest would be more than sufficient to meet the FCC's requirements (Id.; Tr. 102-3). Based on her review of Dailey's financial statement, Selznick concluded that he had "substantially more" than $360,070 in net liquid assets. They specifically discussed when his partnership profits would be received (Tr. 101).

13. A copy of Dailey's "Financial Statement," dated as of November 30, 1991, lists "cash" of $218,000, partnership profits receivable totalling $230,864 and partnership inventory interest of $150,368 (Selznick Ex. 4, App. A). The same November 30, 1991 Financial Statement shows Dailey's total

assets to be $2,939,232, total liabilities to be $1,019,970 and his net worth to be $1,919,262 (Id.).

14. Selznick stated that based on her review of the Form 301 Instructions, her discussions with then-communications counsel Peter Tannenwald, her oral loan commitment from Dailey and her item-by-item review of Dailey's financial statement, she certified as to her financial qualifications in the Form 301 application which she signed on December 13, 1991 and which was filed December 16, 1991 (Selznick Ex. 4, ¶¶ 7-8).

15. Dailey did not mention the terms under which he would provide the funds. Items such as interest rate, repayment arrangement, or security and collateral were never discussed (Selznick Ex. 4, Appendix B, p. 58).

16. Selznick stated that she understood from the outset that Dailey's loan would be based on "standard commercial terms for start-up businesses." (Selznick Ex. 4, ¶ 8). She asserts that she understood from the outset that such loans would mean a 60-month note, an interest rate of several points above prime and that the loan would be secured by the station's assets and personally guaranteed by her (Id.). Dailey also testified that reasonable commercial terms are implicit in his commitment to loan funds to Selznick (Selznick Ex. 4, Appendix B). The loan would be "about 4-5 percent above prime...a lien on the station's hard assets, a five-year term and a personal guarantee." (Id.). Dailey stated that, despite his personal friendship with Selznick, it would be a "standard loan," on the same terms that she might obtain from a bank (Id.).

17. The record does not show that Dailey researched the El Rio market, that he knew its demographics, or that he had any knowledge of the market whatsoever when he told Selznick he was willing to provide the financing or at any time thereafter. There is nothing to show that Selznick gave him any written information on this market prior to filing her application, or that she provided Dailey with an estimate of station revenues or an estimate of the value of an operating station in the area.

18. There is no showing that Dailey saw letters regarding site assurance, Selznick's balance sheet, financial statement, or bank statements. He has not seen an appraisal on either apartment owned by Selznick (Clanton Ex. 2, p. 31).

19. Selznick did not obtain written documentation regarding Dailey's proposal to provide financing, nor did she ask Dailey for any such document (Clanton Ex. 2, pp. 52, 54-55).

20. In August 1993, Selznick prepared and asked Dailey to sign a declaration in which he was to say she requested $360,000 from him in 1991 (Selznick Ex. 4, App. B, p. 58). Dailey's recollection is that Selznick told him in 1991 that her total cost was $350,000 (Clanton Ex. pp. 58, 74, 84).

21. Dailey also testified that, when Selznick informed him that he needed to have "net liquid assets" to cover his commitment, he brought up his balance sheet on his computer screen and they went over "item-by-item" what

would be considered liquid (Clanton Ex. 2, pp. 52-53). Dailey explained that he and Selznick concluded from their item-by-item review that he had "over $500,000" in net liquid assets from his available cash, his partnership profits due and his partnership inventory interest due (Id. p. 53).

22. Dailey stored his financial statement on his own computer and updated it monthly (Clanton Ex. 2, p. 92). He brought up his most recent statement on the computer's screen during this phone conversation. It is not known what data appeared on Dailey's computer screen; at the hearing, Selznick could not recall the specific numbers Dailey read (Tr. 100).

23. Neither Dailey nor Selznick were aware of the Commission's definition of "net liquid assets."[1] Dailey focused on gross liquid assets, i.e., those assets which are considered liquid, without regard for offsetting liabilities. He asked Selznick, "Well, what does the Commission mean by liquid assets?" (Clanton Ex. 2, p. 52). He started to read from his computer screen those items which he believed would qualify as a liquid asset. Dailey decided that his cash, partnership profits, and partnership inventory interest[2] would be liquid assets. He stopped reading at that point, for the gross total was over $500,000, more than Selznick had said she would require (Clanton Ex. 2, p. 53). Dailey did not mention anything about his liabilities to Selznick; the sole source of Selznick's knowledge about Dailey liabilities is his financial statement, which she first saw in August 1993 (Clanton Ex. p. 33, 92).

24. Dailey's November 30, 1991, financial statement states as follows:

Assets

| | |
|---|---|
| Peralta Hills Home (Appraised Value) | $1,600,000 |
| Cash | 218,000 |
| Partnership Profits | 230,864 |
| Salary Receivable | 50,000 |
| Partnership Inventory Interest | 150,368 |
| RunTime Technologies Investment At Cost | 420,000 |
| Personal Property | 250,000 |
| Automobiles | 20,000 |
| Total | $2,939,232 |

[1] There is nothing in the record to indicate that Selznick raised this matter with her communications counsel.

[2] The partnership inventory interest was being paid at the rate of $2,770 per month (Clanton Ex. 2, p. 103).

Liabilities

| | |
|---|---|
| Mortgage Debt. . . . . | $ 975,000 |
| Bank Loans . . . . . | 44,970 |
| Notes Payable. . . . . | - |
| Income Taxes Payable . . . . . | - |
| Charge Accounts Payable. . . . . | - |
| Total . . . . . | $1,019,970 |

(Selznick Ex. 4, App. A).

25. Dailey did not have his home appraised until September 1992 (Clanton Ex. 2, p. 96). He conceded that he did not know the appraised value of his home on November 30, 1991 (Clanton Ex. 2, p.97). However, he testified that he purchased the home in January 1991 for $1.3 million and made $50,000 worth of capital improvements (Clanton Ex. 2, p. 97).

26. The Form 301 instructions state that an applicant's budget must estimate the cost of items "in place and ready for operation." Selznick was not sure she read that portion of the instructions. She read the portion of the instructions which address an applicant who intends to obtain financing from an individual. That paragraph states that the applicant must have "on hand" a document giving the individual's financial statement and his net income received after federal income taxes for the previous two years. Selznick interpreted "on hand" to mean that she did not have to have such a document in her possession, but that it should be readily available to her if needed (Tr. 80-85).

27. Selznick did not obtain Dailey's income after taxes for any year prior to filing her application. This sum was not discussed until the summer of 1993 (Clanton Ex. 2, p. 109-110).

Present Financial Qualifications - Selznick

28. When Selznick estimated in 1991 that her FM station's costs would total $360,070, she had contemplated constructing a large FM station that would accommodate 24-hour "live" service, would utilize all new equipment and would have the substantial operating expenses generated by a large-station operation (Selznick Ex. 5).

29. After discussions with four radio brokers and media consultants in the summer of 1993, Selznick concluded that her 1991 cost estimate, premised on her proposal to buy 100 percent new equipment and to operate on a 24 hour "live" basis, was unreasonably high (Id.). However, one of the brokers stated that while a station could be put on the air for around $100,000, he thought that $300,000 would be a more realistic estimate. As a result Selznick believed that she would never spend $360,070 to construct her proposed El Rio station, and she seeks to amend her application to report this change and to update her cost estimate (Id., see Corrected Petition for Leave to Amend, filed January 13, 1994).

30. Selznick's revised construction budget totals $79,460 (Selznick Ex. 5, ¶ 3, App. C). Her revised budget for first three months' operating costs is $30,000 (Id.). Selznick's revised budget totals $109,460 (Id.).

31. To meet her $109,460 revised cost estimate, Selznick is relying principally on her own net liquid assets and for up to $40,000 to be loaned by Dailey (Selznick Ex. 5, ¶ 4). The loan from Dailey would be under the same terms as discussed in Selznick Exhibit 4, supra (Id.). Selznick testified that Daily had confirmed to her that he would loan up to $40,000 for the FM station if she so requests (Id.).

32. Selznick estimates she now has $140,700 available to construct and operate the El Rio station for three months without revenue. Dailey is to provide $40,000, and she will provide the remainder of $100,700 from her personal assets (Selznick Ex. 5).

33. Selznick's present financial statement shows the following:

Assets

| | |
|---|---|
| Cash on Hand | $40,000 |
| Retirement Accounts | 25,000 |
| Inheritance Receivable | 8,000 |
| 99 Bank Street Apartment 3L Cooperative Stock | 86,000 |
| 67 East 11th Apartment 401 Cooperative Stock | 118,000 |
| Total | $277,000 |

Liabilities

| | |
|---|---|
| Mortgage Debt | $ 64,000 |
| Mortgage Debt | 110,000 |
| Bank Loans/Notes Payable | -0- |
| Credit Cards Payable | 1,000 |
| Payable - Other | 1,200 |
| Net Liquid Assets | $100,700 |

(Selznick Ex. 4, App. D).

34. The record does not contain Dailey's current financial statement, nor any current information from which his financial ability to make even a $40,000 loan may be ascertained. There is no loan commitment letter for the proposed $40,000 loan from Dailey. Selznick asserts that Dailey's deposition testimony, Selznick Ex. 4, App. B, and his declaration of August 27, 1993, which is not in evidence, constitute his written loan commitment. In neither of these documents is there a mention of collateral. Selznick claims that the collateral was understood (Tr. 129). She gives no basis for this understanding.

Standard Comparative Issue

35. The FCC is holding in abeyance the processing of applications and the adjudication of hearing proceedings involving mutually exclusive proposals for new broadcast facilities in light of the opinion of the United States Court of Appeals for the District of Columbia in Bechtel v. FCC, FCC 10 F.3d 875 (D.C. Cir. 1993). This ruling held that the integration of ownership into management, one of the principal criteria used in evaluating applicants for new broadcast facilities, is arbitrary and capricious and therefore unlawful.

36. Because integration has been a crucial factor in many recent comparative proceedings, the Commission has decided to stay such pending cases while it considers appropriate action responsive to the court's opinion. During the freeze, predesignation procedures and hearing proceedings (except those aspects of hearing proceedings not involving comparative analysis of new applicants' proposals) have been suspended. See Public Notice, FCC 94-91 (February 25, 1994).

37. In light of the above-cited stay, no evidence regarding the Standard Comparative Issue was received at hearing. However, in light of the findings on the basic qualification of applicants herein and the decision reached below the Standard Comparative Issue is deemed irrelevant.

Conclusions of Law

Selznick's Initial Financial Qualifications/False Certification

38. Selznick's initial estimate to construct and operate her station for three months was $360,070. To meet these costs, Selznick was relying on a loan in that amount from her former law partner, Joseph P. Dailey. The record shows that the loan commitment from Dailey was not reduced to a writing. Additionally, the record shows that Selznick and Dailey did not discuss any of the terms of the loan before Selznick filed her application. No mention was made of the interest rate, repayment arrangement, collateral or other conditions. At hearing Selznick and Dailey testified that they assumed that the loan particulars would be the same as it was customary at that time to make regarding any standard commercial loan.

39. In Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853 (1989), the Commission stated that it was strengthening its financial certification requirements (¶ 42, p. 3858). The Commission now requires that an applicant have information and documentation regarding its cost estimate and funding sources on hand at the time it submits the application, as was required prior to 1981 (¶ 43, p. 3858). In its Instruction in Section III, Form 301 the Commission notes that documentation that establishes an applicant's financial qualifications, includes, among other things, a balance sheet of the applicant; net income statements for the past two years; itemization of all applicant's deposits; financial statements for all persons who agreed to furnish funds, purchase stock, extend credit or guarantee loans.

40. In light of the foregoing it must be concluded that Selznick has not met the Commission's standard. Selznick had no writings from Dailey, either to memorialize his financing commitment, or to demonstrate his financial ability to make the loan. Although Dailey's financial statement is dated November 30, 1991, Selznick first saw it in August of 1993. At the time that Selznick discussed financing with Dailey, Dailey brought on his financial statement on his personal computer but not in Selznick's presence. She did not examine his financial statement prior to filing her application but rather relied on what Dailey spoke to her over the phone.

41. Furthermore, the oral communications between Selznick and Dailey did not include all of the pertinent information necessary to render reasonable assurance of funds available. Selznick and Dailey did not discuss any of the terms of the loan before she filed her application. No mention was made of the interest rate, repayment arrangements, collateral or other conditions. Selznick assumed that Dailey's loan would be based on "standard commercial terms for start-up businesses." (See Findings #16, above.) Being unaware of Dailey's conditions, Selznick could not have made an accurate attestation. Selznick's claim of a "mutual understanding of contractual terms" is undercut by the fact that the understanding was not expressed. An understanding must be based upon some outward communication. Dailey proved to be accommodating[3] but what Selznick relied on cannot be said to constitute reasonable assurance of funding.

42. In addition, the record is not at all clear that Selznick adequately estimated her costs of construction and operation. Her budget omitted the Commission's hearing fee ($6,760) commission and filing fees, California sales tax and freight charges, cost of moving to California and cost of her subsistence for the first three months of the station operation. These increases to her cost estimate would cause her costs to exceed the funds which Dailey might make available to her. Selznick asserted that she would have been able to meet any increase to her cost estimate from funds allocated but unspent for installation. She stated at hearing that she was advised that her installation estimate was too high. However, no figures were cited to indicate what her reduced installation cost would be. Selznick also asserts that a recent Commission ruling (see David A. Ringer, FCC 94-126, released June 8, 1994) holds that an applicant's cost budget should be liberally constructed particularly whether the budget includes a "miscellaneous category." However, there is no record evidence that Selznick's budget contained a miscellaneous category. It is concluded that Selznick has not sustained her burden of proof under the financial issue; has not demonstrated that she is financially able to construct and operate as proposed.

43. However, a fair reading of the record demonstrates that Selznick did not intend to misrepresent to the Commission her financial qualification. She believed that Dailey could and would cover all costs of construction and operation and that she relied on the advice of her counsel as to filing

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[3] There is no record evidence that Dailey considered factors regarding the proposed operation which a prudent investor normally would to determine whether an investment of $360,000 in a radio station in El Rio was warranted. Cf. Findings 15, 16 and 18, above.

instructions and to the interpretations of them.[4] The misrepresentation issue IS RESOLVED in Selznick's favor.

Selznick's Current Financial Qualifications

44. Since filing Selznick has changed her financial program for the construction and operation of the proposed station. To this end Selznick has submitted for approval an amendment to her application (January 4, 1994), (a Corrected Petition for Leave to Amend was filed January 13, 1994). The basis for this change is that when settlement talks with applicant Clanton finally collapsed in the summer of 1993, she consulted numerous experts to determine whether it was worthwhile to continue to pursue the El Rio application in light of the change in the FM radio environment and was advised that her original cost budget was unrealistic and excessive. She decided to continue her application with a revised budget and revised funding.

45. Selznick's Petition for Leave to Amend is filed pursuant to Section 1.65 of the Commission Rules which requires the reporting of material changes to license application and Section 73.3522(b) which allows post-designation amendments only upon a showing of good cause for late filing.

46. The elements of good cause are stated in Erwin O'Connor Broadcasting Co., 22 FCC 2d 140 (Rev. Bd. 1970). The moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

47. Clanton argues that Selznick did not act with due diligence and that the amendment was voluntarily made. Additionally, Clanton argues that Selznick is seeking reconsideration of an interlocutory ruling made in Memorandum Opinion and Order, 93M-583, released September 13, 1993.

48. In a pleading filed August 30, 1993, Selznick sought leave to amend her financial proposal stating that she preferred to revamp her proposal because in doing so her need to borrow money to finance construction and early operations would be greatly reduced. thereby reducing the debt service that the proposed station would need to support.

49. Clanton opposed the grant of the August 30, 1993 petition on the grounds that Selznick did not meet the good cause test of Erwin O'Connor, supra. After due consideration of Clanton's argument, Selznick's Petition for Leave to Amend was denied. (See Memorandum Opinion and Order, 93M-583, released September 13, 1993.)

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[4] In light of the determination made herein, Selznick's January 4, 1994 Motion to Delete Forfeiture Proceeding IS DISMISSED as moot.

50. Clanton subsequently challenged the adequacy of Selznick's initial financial proposal in his Petition to Enlarge Issues filed September 3, 1993. By Memorandum Opinion and Order, 93M-625, released September 30, 1993, Clanton's petition was granted and a financial issue and a false representation of financial qualification issue were added against Selznick.

51. For reasons stated below, Selznick's pending January 13, 1994 Corrected Petition for Leave to Amend must be denied.

52. Selznick's January 13, 1994 Petition for Leave to Amend ostensibly is the same as her Petition for Leave to Amend filed August 30, 1993. As such it seeks an impermissible reconsideration of an interlocutory ruling. See Section 1.301(b) of the Commission's Rules.

53. Furthermore, Selznick has not meet the due diligence test. The financial qualification issue against Selznick was designated September 30, 1993. Selznick did not file her amendment until some three months later, January 4, 1994. Commission policy dictates that amendments intended to cure a defect in an application be filed within 30 days of the date the applicant learns of the defect. Cf. Imagists, 6 FCC Rcd 7440 (Rev. Bd. 1991). Selznick actually stated in her August 30, 1993 petition that her financial proposal had changed. Selznick's instant amendment was filed well beyond the 30 day period allowed. Selznick did not seek permission to appeal the September 13, 1993 ruling nor did she offer any reason for filing the January 4, 1994 petition late.

54. Additionally, Selznick seeks to amend her financial proposal as a matter of preference. This obviously is a voluntary action on her part. The fact that she was obligated to report a change in her financial proposal pursuant to Section 1.65 of the Commission's Rules does not render the change of the financial proposal involuntary. Selznick has made no showing that the change in her financial proposal was involuntarily made. It is basic Commission policy that applications for broadcast licenses be final in form and changes thereto to be made in strict compliance to the Rules. Commission requirements are not to be relaxed simply to cure a disqualifying issue so as to preserve the Commission's choice of applicants.

55. For the foregoing reasons, Selznick's January 13, 1994 Corrected Petition for Leave to Amend must be denied on the grounds that it lacks good cause for acceptance.

56. Moreover, applicants seeking to amend their financial showing must also demonstrate that they were financially qualified ab initio, Aspen FM, Inc., 6 FCC Rcd 1602 (1991). As indicated above, Selznick has not met this requirement.

57. However, even if Selznick's January 13, 1994 amendment were to be accepted, it does not establish her current financial qualification. Selznick estimates that currently her construction and operation costs will be $109,460. She will rely on her own assets and for a loan from Dailey up to $40,000. She shows assets of $277,000 and liabilities of $100,700. Her assets include the proceeds of real estate which is estimated at $204,000.

However, by Commission policy she may not credit the full appraised value of real estate in determining liquid assets but rather must discount it by a third. See Port Huron Family Radio, Inc., 5 FCC Rcd 4562 (1990). The value of Selznick's real estate must be reduced by $68,000. This reduces her net liquid assets to $32,700, which together with Dailey's loan of $40,000 is insufficient to meet her estimated costs of $109,460.

## Ultimate Conclusions of Law

58. Selznick has been found to be financially unqualified. Clanton has been found qualified and there is no impediment to the grant of his application.

Accordingly, IT IS ORDERED that Selznick's January 13, 1994 Corrected Petition for Leave to Amend IS DENIED.

IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Raymond W. Clanton (File No. BPH-911216MC) IS GRANTED, and the application of Loren F. Selznick (File No. BPH-911216MD) IS DENIED. [5]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak

John M. Frysiak
Administrative Law Judge

[5] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

DA 94-1260

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| American Telephone & | ) | File Nos. USP-93-W-296 |
| Telegraph Company | ) | USP-94-W-096 |
| MCI Telecommunications Corp. | ) | USP-94-W-131 |
| Sprint | ) | USP-94-W-141 |
| | ) | USP-94-W-209 |
| | ) | USP-94-W-226 |
| | ) | USP-94-W-231 |
| | ) | USP-94-W-249 |
| | ) | USP-94-W-296 |
| | ) | USP-94-W-300 |
| | ) | USP-94-W-321 |
| | ) | USP-94-W-329 |
| Petitions for Waiver of the | ) | |
| International Settlements Policy | ) | |
| for a Change in the Accounting | ) | |
| Rate for Switched Voice Service | ) | |
| with Australia, Canada, Japan, the | ) | |
| Netherlands, and the United Kingdom | ) | |

**MEMORANDUM OPINION,**
**ORDER AND AUTHORIZATION**

**Adopted:** November 14, 1994 **Released:** November 14, 1994

By the Chief, International Bureau:

## I. INTRODUCTION

1. In this order, we consider several petitions for waiver of the Commission's International Settlements Policy (ISP)[1] to permit changes in the accounting rates between the United States and other countries. AT&T has filed nine petitions,[2] MCI has filed two petitions,[3] and Sprint has filed one petition.[4] The Commission staff sent a letter to the U.S. carriers in each

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[1]The ISP requires uniform settlement rates, accounting rates and division of tolls for U.S. international carriers on parallel routes. See Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes, 51 Fed. Reg. 4736 (1986) (ISP Order); Reconsideration, 2 FCC Rcd 1118 (1987); Further Reconsideration, 3 FCC Rcd 1614 (1988). In 1991, the Commission reformed the ISP to encourage and facilitate accounting rate reductions by U.S. carriers. See Regulation of International Accounting Rates, 6 FCC Rcd 3552 (1991) (Phase I Report and Order) Reconsideration, 7 FCC Rcd 8049 (1992).

[2]AT&T, Petition for Waiver, USP-93-W-296, September 24, 1993 (Mercury); AT&T, Petition for Waiver, USP-94-W-096, February 16, 1994 (Netherlands PTT); AT&T, Petition for Waiver, USP-94-W-131, March 8, 1994 (Unitel); AT&T, Petition for Waiver, USP-94-W-141, March 30, 1994 (British Telecom); AT&T, Petition for Waiver, USP-94-W-209, May 10, 1994 (Stentor); AT&T, Petition for Waiver, USP-94-W-231, May 31, 1994 (Telstra); AT&T, Petition for Waiver, USP-94-W-249, June 16, 1994 (Stentor); AT&T, Petition for Waiver, USP-94-W-296, July 20, 1994 (Kokusai Denshin Denwa); and AT&T, Petition for Waiver, USP-94-W-300, July 28, 1994 (Mercury).

[3]MCI, Petition for Waiver, USP-94-W-321, August 15, 1994 (Stentor) and MCI, Petition for Waiver USP-94-W-329, August 24, 1994 (British Telecom). MCI filed another petition for waiver with British Telecom (USP-94-W-034, November 16, 1993) that was superseded by USP-94-W-329.

[4]Sprint, Petition for Waiver, USP-94-W-226, May 27, 1994.

case stating that the companies must await formal staff action before the proposed modifications could be implemented.[5] In this decision, we approve these petitions for waiver to reduce the accounting rates for switched telephone service, including Country Direct-type offerings which include an additional thirty seconds for call set-up time in the calculation of settlement minutes. We reject those parts of the petitions which seek to introduce a higher, non-uniform accounting rate for some service classifications, or to increase the existing surcharge on some collect calls because proponents of these charges have not demonstrated that these requests are in the public interest.

## II. SUMMARY OF WAIVER REQUESTS

### *A. Accounting Rates with Surcharges*

2. AT&T's waiver petition with Mercury in the United Kingdom seeks to implement a change in the accounting rate for IMTS and to introduce and establish accounting rates for certain service classifications for the first time. Specifically, the waiver seeks to implement a reduction in the accounting rate for switched voice service from 0.4 Special Drawing Rights (SDR)[6] per minute to 0.3 SDR per minute, and to add thirty seconds to the conversation time of each USADirect message in calculating settlement minutes of such calls. USADirect has not been previously provided in conjunction with Mercury. The extra thirty seconds is equivalent to a surcharge of 0.075 SDR for each USADirect call.[7] The accounting rate for each minute of service would be divided equally between AT&T and Mercury. The proposed effective date is not stated in the petition. AT&T asserts that the proposed change in the accounting rate is in the public interest because: a) the absolute level of the proposed accounting rate and the percentage reduction in the rate represent significant progress toward cost-based accounting rates; b) the reduction recognizes differences in the costs of call completion for USADirect and other IMTS classifications; c) the reduction provides a framework for further accounting rate reductions between the United States and the United Kingdom; and d) the lower accounting rate will produce reductions in net settlement payments to the United Kingdom, which according to AT&T will total

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[5] See Letter from George S. Li to Elaine R. McHale, AT&T, dated October 12, 1993; Letter from George S. Li to Elaine R. McHale, AT&T, dated March 1, 1994; Letter from George S. Li to Elaine R. McHale, AT&T, dated March 22, 1994; Letter from George S. Li to Elaine R. McHale, AT&T, dated April 14, 1994; Letter from George S. Li to Elaine R. McHale, AT&T, dated May 24, 1994; Letter from George S. Li to Marybeth Banks, Sprint, dated June 10, 1994; Letter from George S. Li to Elaine R. McHale, AT&T, dated June 10, 1994; Letter from George S. Li to Elaine R. McHale, AT&T, dated June 30, 1994; Letter from George S. Li to Elaine R. McHale, AT&T, dated August 3, 1994; Letter from George S. Li to Elaine R. McHale, AT&T, dated August 4, 1994; Letter from George S. Li to Jodi L. Cooper, MCI, dated August 29, 1994; and Letter from George S. Li to Jodi L. Cooper, MCI, dated September 9, 1994.

[6] The current exchange rate between the SDR and the U.S. dollar is approximately 1 SDR=$1.50. At this rate, 0.4 SDR equals $0.60.

[7] AT&T filed petitions for waiver for service provided with two other administrations, France Telecom International (See USP-94-W-053) and Enterprise Des Postes, Telephones et Telegraphes Swisses (See USP-93-W-295), to implement changes in the accounting rate for IMTS. These revisions were similar to the revisions proposed in the instant petition for waiver involving Mercury's service in that the two other petitions proposed to reduce the accounting rate for IMTS and to institute a surcharge on each USADirect call based on thirty seconds of network utilization time. The Common Carrier Bureau staff notified AT&T that grant of the petitions might not serve the public interest and that AT&T would need formal staff action before it could implement the proposed accounting rate changes. AT&T subsequently withdrew the two petitions and filed new petitions for waiver (See USP-94-W-206 and USP-94-W-134). These petitions proposed an accounting rate for each minute that was slightly higher than the accounting rate that had been proposed in the petitions that were withdrawn, but they did not include a surcharge for USADirect service. The proposed accounting rates were allowed to go into effect.

$3.6 million per year, and will benefit all of AT&T's IMTS ratepayers.

3. AT&T notes that the proposed IMTS accounting rate is below the Commission's benchmark range[8] for Europe, which the Commission set at settlement rates of $0.23 to $0.39 per minute to terminate calls in Europe. AT&T argues that the lower accounting rate will be a new target for negotiations with other countries, particularly in Europe. AT&T also argues that the proposal does not constitute an increase in any existing IMTS accounting rates, unlike other proposals that the Commission has rejected. AT&T also argues that the surcharge for each USADirect call recognizes the increased set-up time needed to establish such a call and in this regard it is similar to other operator-assisted, received collect calls, which also have a surcharge.

4. AT&T's other waiver with Mercury seeks to introduce and establish a surcharge of 4.0 SDR per message for received collect calls, payable to the non-billing administration. This change would be effective retroactively on April 1, 1994. AT&T asserts that the proposed change in the accounting rate is in the public interest because April, 1994 is the earliest possible date for any reduction in the accounting rate, and will lead to reduced U.S. settlement outpayments.

5. AT&T's waiver with the Netherlands PTT seeks to implement a reduction in the accounting rate for switched voice service, including USADirect service, from 0.5 SDR per minute to 0.4 SDR per minute, and to add thirty seconds to the conversation time of each USADirect message in calculating settlement minutes of such calls. The accounting rate would be effective January 1, 1994 and be divided on a 50/50 basis. The extra thirty seconds is equivalent to a surcharge of 0.1 SDR for each USADirect message. The surcharge for received collect calls remains 3.0 SDR. AT&T asserts that accounting rate reductions with other administrations are anticipated if this proposal is accepted.

6. AT&T's waiver with Unitel in Canada seeks to implement a reduction in the accounting rates for switched voice service, including USADirect and Unitel's Country Direct service, from $0.28 per minute to $0.26 per minute during the full period and from $0.24 per minute to $0.22 per minute during the reduced period,[9] and to add the equivalent of thirty seconds to the conversation time of each USADirect and Unitel's Country Direct message in calculating settlement minutes of such calls. The result is a surcharge of $0.065 per message for each such call made during the full period and $0.055 per message for each such call made during the reduced period. The surcharge for received collect calls remains $1.00 but the surcharge for calling card service would be reduced from $1.00 to $0.50 per message. The accounting rate would be effective January 1, 1994 and be divided on a 50/50 basis.

7. AT&T's waiver with Telstra in Australia seeks to implement a reduction in the accounting rate for switched voice service, including USADirect and Telstra's Country Direct service, from 0.55 SDR per minute to 0.4 SDR per minute, and to add thirty seconds to the conversation time of each USADirect and Telstra's Country Direct message in calculating settlement minutes for

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[8]The Commission defined its benchmark ranges in terms of settlement rates per minute rather than accounting rates because a settlement rate, being one-half of the accounting rate, represents the payment per minute that is owed by the billing carrier to the administration in the terminal country to terminate a minute of service. See Regulation of International Accounting Rates, 7 FCC Rcd 8040, 8041 (1992).

[9]The terms "Full Period" and "Reduced Period" are used frequently to identify the peak and the off-peak periods in international communications.

such calls.[10] The extra thirty seconds is equivalent to a surcharge of 0.1 SDR for each USADirect and Country Direct call.[11] In addition, the waiver seeks to implement a reduction for Global Software Defined Network ("GSDN") service from 0.6 SDR per minute to 0.4 SDR per minute. The accounting rate would be effective July 1, 1994 and be divided on a 50/50 basis.

8. AT&T's waiver with Kokusai Denshin Denwa ("KDD") in Japan seeks to implement a reduction in the accounting rate for switched voice service, including USADirect and KDD's Country Direct service, from 0.75 SDR per minute to 0.6 SDR per minute, and to add thirty seconds to the conversation time of each USADirect and KDD's Country Direct message in calculating the settlement minutes for such calls. The extra thirty seconds is equivalent to a surcharge of 0.15 SDR for each USADirect and KDD's Country Direct call. In addition, the waiver seeks to implement a reduction in International 56 kbps Switched service from 0.75 SDR per minute to 0.6 SDR per minute, in GSDN service from 0.64 SDR per minute to 0.5 SDR per minute, and in Network Remote Access Overseas service from 0.75 SDR per minute to 0.6 SDR per minute. The surcharge on received collect calls remains at 1.9 SDR. Each accounting rate would be effective October 1, 1994 and be divided on a 50/50 basis.

9. AT&T argues that the proposed accounting rate changes for service with the Netherlands PTT, Unitel, Telstra, and KDD recognize differences in costs between USADirect and other IMTS calls, will produce reductions in net settlements to each country, and benefit all AT&T switched service ratepayers.

10. Table 1 summarizes AT&T's current accounting rates with Mercury, Netherlands PTT, Unitel, Telstra, and KDD, and those rates filed in the petitions for waiver.

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[10]AT&T has an operating agreement to provide service with another carrier in Australia, OPTUS, which, like Mercury in the United Kingdom, is a recent entrant into the international market for switched telephone service with the United States. AT&T's operating agreement with OPTUS has a single accounting rate for IMTS and no surcharge on USADirect calls.

[11]There is no surcharge on received collect calls between the United States and Australia.

**Table 1. AT&T's Proposed Changes with Surcharges**

| Service Classification | Current A/R | Proposed A/R | Effective Date |
|---|---|---|---|
| *Mercury* | | | |
| IMTS | 0.4 SDR | 0.3 SDR | Not Stated |
| Received Collect Surcharge | — | 4.0 SDR | 4/1/94 |
| USADirect Surcharge | — | 0.075 SDR | Not Stated |
| *Netherlands PTT* | | | |
| IMTS | 0.5 SDR | 0.4 SDR | 1/1/94 |
| Received Collect Surcharge | 3.0 SDR | 3.0 SDR | 1/1/94 |
| USADirect Surcharge | — | 0.1 SDR | 1/1/94 |
| *Unitel* | | | |
| IMTS | $0.28 (full)<br>$0.24 (reduced) | $0.26 (full)<br>$0.22 (reduced) | 1/1/94 |
| Received Collect Surcharge | $1.00 | $1.00 | 1/1/94 |
| Calling Card Surcharge | $1.00 | $0.50 | 1/1/94<br>1/1/94 |
| USA/Country Direct Surcharge | — | $0.065 (full)<br>$0.055 (reduced) | 1/1/94 |
| *Telstra* | | | |
| IMTS | 0.55 SDR | 0.4 SDR | 7/1/94 |
| GSDN | 0.6 SDR | 0.4 SDR | 7/1/94 |
| USA/Country Direct Surcharge | — | 0.1 SDR | 7/1/94 |
| *KDD* | | | |
| IMTS | 0.75 SDR | 0.6 SDR | 10/1/94 |
| Received Collect Surcharge | 1.9 SDR | 1.9 SDR | 10/1/94 |
| USA/Country Direct Surcharge | — | 0.15 SDR | 10/1/94 |
| Int'l. 56 kbps Switched Digital | 0.75 SDR | 0.6 SDR | 10/1/94 |
| GSDN | 0.75 SDR | 0.6 SDR | 10/1/94 |
| Network Remote Access | 0.75 SDR | 0.6 SDR | 10/1/94 |

### *B. Non-Uniform Accounting Rates*

11. The waivers of MCI, AT&T, and Sprint for service provided with British Telecom (BT) seek to implement changes in the accounting rate for IMTS.[12]

[12] IDB Worldcom also filed petitions for waiver with BT. The first petition (IDB Worldcom, Petition for Waiver, USP-94-W-089, January 21, 1994,) is the same as the petitions of AT&T and Sprint except that IDB does not offer operator-assisted service. IDB's second petition (IDB Worldcom, Petition for Waiver, USP-94-W-311, August 9, 1994), which supersedes the January 21 petition, proposes a different accounting rate with BT that is the same as the accounting rate proposed by MCI with BT in its petition described below except for absence of operator-assisted

Specifically, the waivers of AT&T and Sprint seek to implement a reduction in the IMTS accounting rate from 0.44 SDR per minute for the full period and 0.35 SDR per minute for the reduced period to 0.34 SDR per minute for all IMTS minutes; a reduction in the International 800 (I-800) accounting rate from 0.44 SDR per minute to 0.34 SDR per minute; a reduction from 0.4 SDR per minute to 0.24 SDR per minute for International Virtual Private Line service;[13] a reduction in Country Direct Service[14] from 0.44 SDR per minute to 0.31 SDR per minute; and an increase in the surcharge for received collect station-to-station calls from 3.25 SDR per message to 4.0 SDR per message, which is the current surcharge for received collect person-to-person calls. MCI's waiver seeks a reduction in the accounting rate from 0.44 SDR per minute for the full period and 0.35 SDR per minute for the reduced period to 0.33 SDR for all IMTS minutes, including Country Direct Service; and an increase in the surcharge for received collect station-to-station calls from 3.25 SDR per message to 4.0 SDR per message.[15] The effective date for the change would be April 1, 1994 for all service classifications except Country Direct Service, which would be effective December 1, 1993. Each U.S. carrier would divide the accounting rate for each minute of service equally with BT.[16] Each petitioner states that its agreement provides the earliest possible reduction in the accounting rate and U.S. settlements outpayment.

12. AT&T also has filed two waivers with Stentor in Canada which are considered in this order. One seeks to introduce and establish the accounting rate of $0.26 per minute for USADirect and Country Direct service. The other waiver with Stentor seeks to implement a reduction in the accounting rate for I-800 service from $0.36 per minute during the full period and $0.30 per minute during the reduced period to a single rate of $0.26 per minute. Both accounting rates would be effective May 1, 1994 and be divided on a 50/50 basis. AT&T's current accounting rates with Stentor for switched voice service are $0.26 during the full period and $0.22 during the reduced period.[17]

13. MCI also has filed a waiver with Stentor which is considered in this order. This waiver seeks to introduce and establish the accounting rate of $0.26 per minute for Country Direct service, and to reduce the accounting rate for I-800 service from the current level of $0.42 per minute during the peak period and $0.36 per minute during the off-peak period to $0.36 and $0.30 during these periods, effective July 1, 1994, and to $0.26 for all minutes, effective August 1, 1994. MCI's current accounting rates with Stentor for switched voice service are $0.26 during the full period and $0.22 during the

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service. The accounting rate proposed by IDB in its second petition was allowed to go into effect.

[13] This service classification is called Global Software Defined Network Service (GSDN) by AT&T and International Virtual Private Line Service (IVPN) by Sprint.

[14] This service classification is called Worldphone by MCI, USADirect by AT&T, and Sprint Express by Sprint.

[15] MCI's November 16, 1993 petition (n. 3 supra) proposes an accounting rate that is identical to the accounting rate AT&T and Sprint propose.

[16] Sprint states that its operating agreement with BT contains no other modifications. AT&T asserts that "[t]he proposed accounting rate agreement is conditioned on changes to the agreement between the parties, including the method for settlements payment and proportionate return." See AT&T/BT Waiver, p.1. AT&T also states in its waiver that the conditions, which have not been submitted to the Commission, will be filed after they are finalized.

[17] The "Full Period" is 8 A.M. to 6 P.M., Monday through Friday; the "Reduced Period" is 6 P.M. to 8 A.M., Monday through Friday, all day Saturday and Sunday, December 25, and January 1.

reduced period.

14. Table 2 summarizes U.S. carriers' current accounting rates with BT and the rates filed in their petitions for waiver, and AT&T's and MCI's current and proposed accounting rates with Stentor.

**Table 2. Proposed Changes with Non-uniform Accounting Rates**

| Service Classification | Current A/R | Proposed A/R | Effective Date |
|---|---|---|---|
| *BT (with AT&T & Sprint)* | | | |
| IMTS | 0.44 SDR (full)<br>0.35 SDR (reduced) | 0 .34 SDR<br>— | 4/1/94 |
| Received Collect Surcharge | 3.25 SDR (station)<br>4.0 SDR (person) | 4.0 SDR<br>4.0 SDR | 4/1/94 |
| I-800 | 0.44 SDR | 0.34 SDR | 4/1/94 |
| GSDN, VCS, IVPN | 0.4 SDR | 0.24 SDR | 4/1/94 |
| USA/Country Direct Service | 0.44 SDR | 0.31 SDR | 12/1/93 |
| *BT (with MCI)* | | | |
| IMTS | 0.44 SDR (full)<br>0.35 SDR (reduced) | 0.33 SDR | 4/1/94 |
| Received Collect Surcharge | 3.25 SDR (station)<br>4.0 SDR (person) | 4.0 SDR<br>4.0 SDR | 4/1/94 |
| I-800 | 0.44 SDR | 0.33 SDR | 4/1/94 |
| Worldphone/Country Direct | 0.44 SDR | 0.33 SDR | 4/1/94 |
| *Stentor (with AT&T)* | | | |
| USA/Country Direct Service | — | $0.26 | 5/1/94 |
| I-800 | 0.36 (full)<br>$0.30 (reduced) | $0.26 | 5/1/94 |
| *Stentor (with MCI)* | | | |
| Country Direct | — | $0.26 | 7/1/94 |
| I-800 | $0.36(full)<br>$0.30 (reduced) | $0.26 | 7/1/94 |

## III. DISCUSSION

### A. Summary of Decision

15. In this order, we find that AT&T's proposals to reduce the IMTS accounting rate with the Netherlands PTT from 0.5 SDR to 0.4 SDR per minute,

with Unitel from $0.28 to $0.26 per minute during the full period and from $0.26 to $0.22 per minute during the reduced period, with Telstra from 0.55 SDR to 0.4 SDR per minute, with Mercury from 0.4 SDR to 0.3 SDR per minute, and with KDD from 0.75 SDR to 0.6 SDR per minute are reasonable steps toward bringing accounting rates for service between the United States and the countries served by these administrations closer to costs. Thus, these proposals are in the public interest and are approved. Similarly, we find that AT&T's proposals to reduce the GSDN accounting rates with Telstra, Mercury, and KDD are important steps toward achieving cost-based accounting rates, as is AT&T's proposal to reduce the accounting rates for International 56 kbps service and Network Remote Access service with KDD. These proposals are in the public interest and are also approved. In addition, we find that AT&T's proposal to introduce and establish an accounting rate for I-800 service with Mercury at 0.3 SDR per minute and to reduce the calling card surcharge with Unitel is in the public interest. We further conclude that the proposal in AT&T's waiver requests with respect to USADirect and Country Direct service to include an additional time element associated with the provision of this service classification is reasonable. Based on the information before us, thirty seconds is a reasonable estimate of the additional time currently required to set up such calls.

16. We conclude that AT&T proposes to introduce an impermissible increase in the surcharge for received collect service with Mercury in violation of our policy on international accounting rates.[18] AT&T has not demonstrated that the increase in the received collect surcharge is in the public interest.

17. In this order, we also approve the proposals of AT&T and Sprint with BT to reduce the accounting rate for Country Direct Service from 0.44 SDR to 0.31 SDR per minute and the proposal of MCI with BT to reduce the accounting rate from 0.44 SDR to 0.33 SDR per minute because they promote our goal of lower, more cost-based accounting rates. We note, however, that the accounting rates between U.S. carriers and BT must be implemented in a fashion that reflects our policy of uniform settlement rates, accounting rates, and division of tolls. We further find that the carriers' proposals to reduce the accounting rate for International Virtual Private Line Service from 0.4 SDR to 0.24 SDR per minute would move the accounting rate for this service closer to costs.

18. We find, however, that the petitions for waiver of AT&T and Sprint with BT contain an accounting rate for IMTS and I-800 service that is higher than the accounting rate proposed for USADirect and Country Direct service, and that the petitions provide no cost basis for this higher rate. We also find that these waiver requests propose an increase in the received collect surcharge for station-to-station calls that is similarly unsupported. We therefore reject the accounting rates proposed by AT&T and Sprint for IMTS and I-800 to the extent they exceed the accounting rate proposed for USADirect and Country Direct service, and also reject the proposed increase in the surcharge on received collect station-to-station calls of MCI, AT&T, and Sprint.

19. We also find that AT&T's proposal to reduce the accounting rate with Stentor for I-800 service would move that rate closer to the cost of providing that service. We therefore approve it. AT&T, however, has provided no

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[18] We note that the foreign carriers involved in the petitions for waiver all provide service in economically developed, industrialized nations that have technologically advanced telecommunications networks, not unlike the U.S. network. The number of main lines per 100 people in these countries, for example, is about the same as the United States, which had 51.49 in 1991. (See ITU Statistical Yearbook, 1992, Geneva, 1994) All countries are OECD members and three belong to the G-7. The carriers are thus well-positioned to move promptly to implement the terms of ITU Recommendation D.140 that accounting rates for international telephone services should be "cost-orientated" and take into account relevant cost trends, be applied to all relations on a non-discriminatory basis, and be implemented in an expeditious manner, normally within one to five years. CCITT Circular No. 169, COM III/ST, October 7, 1992.

justification for establishing an accounting rate for I-800 service and Country Direct service that differs from the accounting rate for IMTS service with Stentor. We therefore reject the accounting rate proposed by AT&T with Stentor for I-800 service and Country Direct-type service to the extent it exceeds the accounting rate for IMTS service.

20. The accounting rate reductions proposed in the waiver petitions are important steps toward compliance with ITU accounting rate principles and with the Commission's directive to U.S. carriers to negotiate cost-based, nondiscriminatory accounting rates.[19] The reductions put the affected rates either within or below the benchmark ranges established by the Commission.[20] The average reduction proposed by U.S. carriers is approximately 25 percent, and AT&T's proposed accounting rate change with Unitel would match the lowest U.S. rate currently in effect.

21. We also believe that our disposition of the proposed surcharges and non-uniform accounting rates is consistent with the guidelines established by the Commission for reviewing such waiver requests. In its Phase I Report and Order the Commission delegated authority to the Common Carrier Bureau "to consider, on a case-by-case basis, granting ISP waiver requests that include a lower, more economically efficient, cost-based, international accounting rate when supported by a sound analysis of the benefits that will result from the implementation of that rate."[21] The Commission stated that the Bureau should approve accounting rate changes if the changes resulted in a) a more cost-based accounting rate, and b) either a commitment to lower calling prices or some other public interest benefit.[22] The Commission stated, however, that "under our waiver option we would expect to deny certain types of waiver requests, such as non-cost-based increases in, or surcharges to, the accounting rate... ."[23]

***B. Accounting Rate Surcharges***

22. AT&T's agreements to reduce the accounting rate between the United States and the Netherlands PTT, and between the United States and Mercury, are conditioned explicitly on inclusion of a separate charge for the USADirect service option that results from adding thirty seconds to the conversation minutes for such calls. Similarly, the agreements with Unitel, Telstra and KDD include a separate charge on the USADirect service option that is based directly on the underlying accounting rate. In order to justify this surcharge, AT&T attempts to distinguish USADirect from other IMTS classifications. Under the proposed accounting rate agreements, thirty seconds would be added to the conversation time of each USADirect and Country Direct

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[19] See Phase I Report and Order, 6 FCC Rcd at 3555.

[20] The Commission has concluded that a reasonable and conservative settlement rate range for service with Europe is between $0.23 and $0.39 per minute and for Asia and other regions the range is between $0.39 and $0.60 per minute. See Regulation of International Accounting Rates, at p 8041, 8043.

[21] Phase I Report and Order, 6 FCC Rcd at 3554. This delegated authority is now within the jurisdiction of the International Bureau. See Order Creating International Bureau, FCC 94-252.

[22] Id. In addition, the Commission made clear its intention to continue using the ISP to prevent whipsawing of U.S. carriers. See id. at 3554, 3555.

[23] See id. at n. 30.

message in calculating settlement minutes of such calls.[24] The accounting rate would be divided on a 50/50 basis so the extra thirty seconds is equivalent to a surcharge of 0.1 SDR with the Netherlands PTT and Telstra; of 0.075 SDR with Mercury; of $0.065 during the full period and $0.055 during the reduced period with Unitel; and of 0.15 SDR with KDD for each USADirect call.[25] Therefore, the proposed surcharge for network utilization time is based on the proposed underlying per minute acccounting rate for IMTS service with each country.

23. We will approve the additional thirty-second increment as reasonable because of the longer call set-up time required for Country Direct-type service, and not because, as AT&T argues, it is "cost-based." While we are encouraged by AT&T's attempt to bring cost considerations into its accounting rate determinations with the administrations, the proposed additional charge is based on an accounting rate that neither AT&T nor its correspondents argue is cost-based.[26] Moreover, while there may be increased network utilization time associated with a USADirect call, AT&T provides no evidence that adjusting the length of a USADirect call by thirty seconds reasonably reflects the additional costs incurred to provide the service. Thus, even if a USADirect call adds some seconds to conversation time, AT&T does not demonstrate that the added time actually results in an increase in the cost of providing such calls to the Netherlands and Australia by 0.1 SDR, to the United Kingdom by 0.075 SDR, or to Canada by $0.065 during the full period and $0.055 during the reduced period. We also note the contrast between this proposal and the proposals by AT&T and Sprint with BT, which propose a lower accounting rate for USADirect and Country Direct service,[27] as further evidence that a surcharge on USADirect service may not reflect costs.

24. AT&T's argument, however, overlooks an important distinction between how costs are incurred to provide an IMTS call and how those costs are recouped through the accounting rate process. A major portion of the cost of providing an international telephone call is fixed and does not vary with the length of a call. It is incurred to establish the circuit between the calling

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[24]The number of minutes in a call is the "call duration." Call duration for purposes of settlements is measured in "conversation minutes" calculated from the time the called party goes off-hook to the time the called party hangs up the receiver. See CCITT Recommendation D.150. The proposed surcharge consists of adding thirty seconds of network utilization to the total conversation time of each USADirect and Country Direct call. The petition for waiver with Unitel does not state explicitly that thirty seconds are added to the total conversation time for USADirect and Country Direct service, but the surcharge for full and reduced period calls suggest strongly that thirty seconds is the basis for the surcharge.

[25]AT&T has estimated that 7.1 percent of the U.S. billed minutes were U.S. carrier country direct minutes in 1991. (See AT&T Reply Comments in Comprehensive Evaluation of the Regulation of International Telephone Service, Department of Commerce, Docket No. 92151-2351 at 20.) The proportion of service attributable to country direct service has probably grown since 1991. Moreover, country direct service from the countries involved in this decision may be greater than the proportion for the world as a whole.

[26]In its own petition for waiver, AT&T states the true cost of providing service between the United States and the United Kingdom is 0.15 SDR per minute. (See AT&T/Mercury Waiver at n.4.) AT&T has used the same figure, 0.15 SDR, in other filings before the Commission (See AT&T Petition to Deny Application of BT North America, File No. ITC-93-126, at 38 n. 41; AT&T Reply to Application of BT North America, File No. ITC-93-126 at 26.) Other information suggests that in the case of Australia the lower accounting rate proposed by AT&T may continue to exceed average cost of providing service by a substantial margin. A recent paper suggests that the average cost per minute of a call between Australia and the United States is between A$0.30 and A$0.50, which converts to approximately 0.15 SDR to 0.37 SDR at current exchange rates. According to the authors, most calls are between cities on high volume links and their cost would fall at the lower end of the range. (See Martin Cave and Ian Martin, Regulation of International Trade in Telecommunications Services: The Potential Benefit of an Accounting Separation Approach. Presented at Negotiating Group on Basic Telecommunications, October 24, 1994.)

[27]See Table 2.

party and the called party and includes signalling the network that a caller wishes to establish a communication path, selecting a circuit and other capital equipment needed for the call, signalling back to complete the circuit, and so on. Once the circuit is established and capital equipment is committed to a call, little additional expense is incurred to maintain service. Thus, the initial, set-up cost of a call is high, whether the call is only a few seconds in duration or several minutes, and the additional cost is quite low.

25. In contrast, the accounting rate process is designed to reimburse administrations on the basis of a call's duration, and therefore is not based on actual costs or way they are incurred. The present reimbursement process is a function of a call's duration measured in minutes of conversation time. For each minute of a call, the billing administration owes an amount equal to the settlement rate. The longer the duration of a call, the greater the settlement payment. The additional time increment for Country Direct-type service recognizes that a circuit is committed to such a call for more time than a international dial call due to the longer set-up time. It is reasonable, therefore, to reflect that time in the reimbursement.

26. AT&T has provided a study[28] which supports a finding that, on average, the additional time currently required to set up a Country Direct-type call is approximately thirty seconds. It appears that thirty seconds is a reasonable and generous allowance to apply to Country Direct-type calls.[29] We expect that the time required to set up a Country Direct-type call may decline in the future as it seems to have done in the past. We will, therefore, require AT&T, and any other U.S. carrier proposing to include additional time for Country Direct-type calls, to include in any petitions for waiver of the ISP sufficient information to justify the average additional time required to set up such calls.[30] We look forward to future petitions for waiver of the ISP to further reduce accounting rates to reflect that technological advances.

27. We are also concerned, as we noted above, that allowing additional time for Country Direct-type calls may lead to a proliferation of waivers that include this or similar additional elements in the accounting rate. Accounting rates presently exceed the cost of providing service and in many cases there are substantial differences. Our policy continues to be lower, non-discriminatory, economically efficient, cost-based accounting rates. To ensure continued progress toward this goal, we expect that any proposal including an additional time element for Country Direct-type calls will be accompanied by a reduction in the basic accounting rate and that that accounting rate, including the added time element for Country Direct-type service, will fall within the relevant benchmark range that we have established for the region in

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[28]The study is described in "Incremental Call Processing Time for AT&T Direct Services (USADirect and World Connect) vs. AT&T ILD Calls" filed with the Commission on November 10, 1994.

[29]Telstra suggests that a Country Direct call requires approximately twenty seconds more time than an average IDD call to set up. See Letter from Deena Shiff, Telstra, to the Commission, October 18, 1994.

[30]Substantiation of the additional time element should be in the form of a study undertaken during a recent, relevant time period. The study should include, but not be limited to, a description of the study methodology used to estimate the additional time, the sample and data collected to calculate the estimate, the sampling technique used to collect the data, the time period for the data, the statistical methods used to calculate the estimates, the statistical reliability of the estimates, and a discussion of the results. The study should be updated on an timely basis, at least annually.

which the particular country is located.[31] Further, the extra time element for Country Direct-type calls will remain in effect only for the period when the accounting rate to which it applies is in effect. We also expect accounting rates that include such an additional time element to reflect any changes in the benchmark ranges that may occur.

28. Based on the foregoing discussion, we find that AT&T's proposal to include an additional time element in the calculation of settlement minutes for USADirect and Country Direct-service is in the public interest. In each instance the proposal incorporates a reduction in the basic accounting rate for IMTS and the resulting accounting rates fall within the relevant benchmark range established by the Commission. Moreover, we believe this step will serve to advance our overall objective of lower, more cost-based, nondiscriminatory, economically efficient accounting rates, and lead to lower net settlement payments than would have otherwise resulted. It is our expectation that as a result of this action U.S. carriers will be in a better position to negotiate further reductions in accounting rates with the administrations in the countries affected by this action and it will also provide an incentive for administrations in other countries to agree to lower accounting rates with U.S. carriers.

29. We are concerned, however, that the implementation of an additional charge for USADirect and Country Direct-type service at a time when accounting rates still exceed costs by a substantial margin may be mistakenly interpreted as an indication that a surcharge accompanied by a reduction in the basic accounting rate is acceptable to this Commission, and may lead to a proliferation of surcharges on Country Direct-type service and other IMTS classifications. Such a development would seriously impede progress toward cost-based, nondiscriminatory accounting rates. We therefore believe that appropriate conditions must be met before we would approve any proposal requesting special treatment for Country Direct-type service or other service classifications. We will monitor closely developments in this area.

***B. Non-Uniform Accounting Rates***

30. The petitions of Sprint and AT&T to reduce the per minute accounting rate for service provided with BT also seek to differentiate AT&T's USADirect, Sprint's Sprint Express, and BT's Country Direct service from other IMTS classifications. In contrast to the treatment of USADirect service proposed in the AT&T/Mercury waiver, the waivers with BT would establish one accounting rate per minute for IMTS and I-800, and another, lower accounting rate for Country Direct-type service. Specifically, the proposals call for an accounting rate for Country Direct-type service that would be 0.03 SDR per minute below the accounting rate for other IMTS service classifications. The two accounting rates, 0.34 SDR and 0.31 SDR, differ from the rate proposed by MCI with BT which is 0.33 SDR for all IMTS classifications.

31. In effect, the non-uniform accounting rates include a higher accounting rate on each minute of IMTS and I-800 service than for Country Direct-type service, and petitioners fail to justify this difference or to demonstrate that the difference is in the public interest. They do not attempt to distinguish Country Direct-type services from other IMTS classifications nor have they presented information or arguments that the higher, proposed accounting rate for all IMTS classifications except Country Direct is justified on the basis of higher costs incurred to provide those service classifications.

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[31] In those instances in which a peak/off-peak, a growth-based, or some other accounting rate structure with multiple rates is in effect, we expect that each and every component of the rate structure will fall within the benchmark range that applies to the relation.

32. The waivers of AT&T and MCI with Stentor propose to establish an accounting rate of $0.26 per minute for USA/Country Direct service and to reduce the accounting rate for I-800 service from $0.36 during the peak period service and $0.26 during the off-peak period service to $0.26 per minute for all periods. In comparison, the rates for IMTS with Stentor are $0.26 during the full period and $0.22 during the reduced period. To date, the Commission has not distinguished USA/Country Direct service and I-800 service from other international switched voice service classifications in its accounting rate determinations. Petitioners do not argue nor have they submitted information in the instant petitions for waiver to distinguish either USA/Country Direct service or I-800 service from IMTS, or to furnish any other basis to establish an accounting rate that is different from the IMTS accounting rate. Moreover, they have presented no showing that the lower accounting rate that is applied to IMTS during the reduced period should not also be applied to USADirect service and I-800 service, nor have they demonstrated that the proposals are in the public interest. We can find no reason to establish a different accounting rate for USA/Country Direct service and I-800 service. As a result, implementation of the proposed accounting rate of $0.26 per minute for the two service classifications would produce an impermissible higher accounting rate for USA/Country Direct service and I-800 service than for IMTS during the reduced period.

33. We are encouraged by the downward movement in accounting rates that these petitions represent and by the fact that the proposed accounting rates with BT are below the benchmark range we set for service with Europe.[32] Based on our analysis of the arguments and information submitted in support of the waiver requests, however, we find that the waivers of MCI, AT&T, and Sprint with BT do not demonstrate that the public interest would be served by the proposed accounting rates for IMTS and I-800 or that we should depart from the Commission's policy against non-cost based increases in, or surcharges to, accounting rates. Similarly, the waivers of AT&T and MCI with Stentor fail to demonstrate that the public interest would be served by allowing accounting rates for Country Direct-type service and I-800 service that are different than other IMTS classifications. We reaffirm "our intention to implement Commission policy to preclude the introduction of higher, non-uniform, international accounting rates that exceed the cost of providing service."[33]

### *C. Accounting Rate Increases*

34. The waivers of AT&T, MCI, and Sprint propose to increase the surcharge on received collect station-to-station calls between the United States and the United Kingdom. Currently, there is a surcharge of 3.25 SDR per message for station-to-station calls and 4.0 SDR per message for person-to-person. AT&T's waiver with Mercury proposes to introduce a uniform surcharge of 4.0 SDR per message for all received collect calls. Similarly, the waivers of AT&T, MCI, and Sprint with BT propose to implement a single surcharge of 4.0 SDR per message for received collect calls. Inasmuch as the current agreements between U.S. carriers and BT have a 3.25 SDR surcharge for each received collect station-to-station call and a 4.0 SDR surcharge for each received collect person-to-person call, and the petitions for waiver propose a 4.0 SDR surcharge on all received collect calls, that part of the petitions dealing

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[32] We note once again, however, that the proposed accounting rates of 0.31 SDR per minute for Country Direct service and 0.34 SDR per minute for other IMTS classifications are significantly higher than AT&T's estimated average cost of 0.15 SDR per minute for service between the United States and the United Kingdom, and AT&T's claim that continuing technological change should lead to further cost reductions in the future. (See AT&T Petition to Deny Application of BT North America File No. ITC-93-126, at 38, n.41.)

[33] See American Telephone and Telegraph Company and MCI Communications Corporation, 5 FCC Rcd 4618 at 4621.

with this surcharge constitutes an increase in the surcharge on received collect station-to-station calls. AT&T's proposal with Mercury to impose a single surcharge on this service classification also constitutes an increase in the prevailing accounting rate on service with the United Kingdom. The proposals, as they apply to received collect station-to-station calls, therefore constitute an increase in the accounting rate surcharge that is currently in effect for that service classification. Petitioners have failed to furnish a cost or other public interest justification to support the increase in the accounting rate surcharge for received collect station-to-station calls. We therefore reject the proposal to increase the surcharge on received collect station-to-station calls.

## IV. CONCLUSION

35. We find that the proposed reductions in the accounting rate for switched voice service between AT&T and the Netherlands PTT, AT&T and Mercury, AT&T and Unitel, AT&T and Telstra, and AT&T and KDD are in the public interest because they will bring accounting rates with these administrations closer to the cost of providing service. Implementation of these reductions is likely to result in lower net settlement payments to the countries served by these administrations than the current accounting rates would produce if they remained in effect. Moreover, these changes promote the Commission's objective of lower, more cost-based, economically efficient accounting rates. We also find that AT&T's waivers with these administrations to include an allowance of additional time for USADirect and Country Direct-type service is a reasonable way to account for the added time required to set up such calls, that thirty seconds is a reasonable estimate of the added time, and that the proposed accounting rates fall within our benchmark ranges. We further find, however, that AT&T's waiver with Mercury includes an impermissible non-cost-based increase in the accounting rate surcharge for received collect station-to-station calls and, therefore, deny AT&T's request to increase that surcharge.

36. In addition, we find that the proposals of MCI, AT&T, and Sprint to reduce the accounting rate for switched service with BT are in the public interest because they will align the accounting rates with this administration more closely with the cost of providing service. These reductions are likely to result in lower net settlement payments to the countries served by these administrations than the current accounting rates would produce if they remained in effect. Moreover, these changes promote the Commission's objective of lower, more cost-based, economically efficient accounting rates. We find, however, that AT&T and Sprint propose a higher accounting rate for IMTS service, including I-800 service, than for Country Direct-type service like USADirect and Sprint Express. The higher accounting rate is not justified on the basis of cost or other differences and thus it is denied. The petitions of AT&T, MCI, and Sprint also seek an impermissible non-cost-based increase in the accounting rate surcharge for received collect station-to-station calls, and the increase is denied. We also note that granting the proposals would result in different accounting rates for service provided by BT with MCI, 0.33 SDR, and by BT with AT&T and Sprint, 0.31 SDR. This would be inconsistent with our uniformity policy. This situation needs to be resolved by the carriers before we allow an accounting rate reduction with BT to be implemented.

37. In past decisions, we have taken steps to remove any U.S. regulatory impediments to the implementation of lower, more cost-based accounting rates, and to streamline the waiver process. These steps include establishing the notification option, stating definitive criteria for the grant of waiver requests, and reducing to 21 days the notice period for obtaining an ISP waiver. We believe these steps have helped to accelerate the introduction of lower accounting rates. In a further attempt to make the accounting rates process more efficient and, at the same time, to be more responsive to concerns expressed by U.S. carriers that petitions for waiver be processed in an expeditious manner, in the future the Chief, Telecommunications Division,

International Bureau, will have delegated authority to issue decisions concerning petitions for waiver of the ISP.

38. Accordingly, IT IS ORDERED that AT&T's petitions for a waiver of the Commission's ISP for service with the Netherlands PTT, Mercury Communications Ltd., Unitel, Kokusai Denshin Denwa, and Telstra are granted except for the increase in the surcharge for received collect station-to-station calls with Mercury, which is DENIED.

39. IT IS FURTHER ORDERED that the petitions for waiver of AT&T and Sprint of the Commission's ISP for service with British Telecom are granted, subject to satisfying the ISP requirement of a uniform accounting rate between U.S. carriers and a foreign carrier on the same route, and of full disclosure in petitions for waiver all changes in the operating agreements between the parties.

40. IT IS FURTHER ORDERED that we deny the portion of AT&T's and Sprint's petitions for waiver requesting a different, higher accounting rate for IMTS and I-800, and an increase in the surcharge for received collect station-to-station calls.

41. IT IS FURTHER ORDERED that the petition for waiver of MCI Communications of the Commission's ISP for service with British Telecom is granted, subject to the condition of satisfying our ISP requirement of a uniform accounting rate between U.S. carriers and a foreign carrier on the same route, and full disclosure in petitions for waiver all changes in the operating agreements between the parties.

42. IT IS FURTHER ORDERED that we deny the portion of MCI's petition for waiver requesting an increase in the surcharge for received collect station-to-station calls.

43. IT IS FURTHER ORDERED that the Chief, Telecommunications Division, International Bureau, has authority to issue decisions concerned with petitions for waiver of the ISP.

44. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Harris

Scott Blake Harris
Chief, International Bureau

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 9 of the Communications Act | ) | MD Docket No. 94-19 |
| | ) | |
| Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year | ) | |

**NOTICE OF PROPOSED RULEMAKING**

Adopted: March 4, 1994 Released: March 11, 1994

Comment Date: April 7, 1994
Reply Comment Date: April 18, 1994

By the Commission:

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APPENDICES

**I. Introduction**

1. By this Notice of Proposed Rulemaking the Commission begins implementation of section 9 of the Communications Act of 1934, which was added by section 6003(a) of the Omnibus Budget Reconciliation Act of 1993 (hereinafter "1993 Budget Act").[1] Section 9(a) authorizes the Commission to assess and collect annual regulatory fees to recover costs incurred in carrying out its enforcement activities, policy and rulemaking activities, user information services, and international activities. Section 9(f)(1) provides that "[t]he Commission shall prescribe appropriate rules and regulations to carry out the provisions of

[1]Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397 (approved August 10, 1993). The new Section 9 of the Communications Act is codified at 47 U.S.C. § 159.

the section." The purpose of this Notice is to set forth proposed rules as provided for in section 9(f)(1).[2]

2. In the performance of its authorization and licensing functions, the Commission assesses and collects fees for applications and other filings pursuant to authority under section 8 of the Communications Act, as amended.[3] As discussed below, we propose in this Notice to utilize similar procedures for collecting regulatory fees under section 9. Further, as with our application fee collection program, our goals in this proceeding are to ensure that the fee collection process does not have an adverse impact on our regulatory activities; that fees are collected and deposited in the most cost effective manner possible; and that fees impose little or no additional paperwork burden on the public.[4] Additionally, we note that the implementation of regulatory fees will further the National Performance Review goals of reinventing Government by requiring beneficiaries of Commission services to pay for such services.

## II. Discussion

### A. Establishment, Adjustment and Amendment of Regulatory Fees

3. Section 9(b)(1)(C) of the Communications Act, 47 U.S.C. § 159(b)(1)(C), requires the Commission to collect the fees established by the Schedule of Regulatory Fees in section 9(g), "until adjusted or amended by the Commission pursuant to paragraph (2) or (3)" of section 9(b). The statutory schedule in

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[2]In this Notice, we also propose several conforming and clarifying amendments to our application fee rules. See part G., below.

[3]47 U.S.C. § 158. See generally 47 C.F.R. Part 1, Subpart G; Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947 (1987) (hereinafter "Fees I"), Supplemental Order, 2 FCC Rcd 1882 (1987), recon. granted in part, 3 FCC Rcd 5987 (1988) (hereinafter "Fees I Reconsideration"); Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990) (hereinafter "Fees II"), recon. granted in part, 6 FCC Rcd 5919 (1991) (hereinafter "Fees II Reconsideration"). See also section 6003(a)(2) of the 1993 Budget Act, Pub. L. 103-66, Title VI, § 6003(a)(2), 107 Stat. 401 (1993) (making conforming amendments to section 8).

[4]See Fees I, 2 FCC Rcd at 948, citing Notice of Proposed Rulemaking in Gen. Docket No. 86-285, FCC No. 86-301, 51 Fed. Reg. 25792 (July 16, 1986) (hereinafter "Fees I Notice").

section 9(g) lists various regulatory fee categories under the Commission's Private Radio Bureau, Mass Media Bureau, and Common Carrier Bureau, and it specifies an annual fee amount for each category. See 47 U.S.C. § 159(g); Appendix A, below. An explanation of each regulatory fee category is set forth below in part F.

4. As indicated above, the statute requires the Commission, in certain circumstances, to make adjustments or amendments to the Schedule of Regulatory Fees. First, since regulatory fees must result in collections of amounts that can reasonably be expected to equal amounts appropriated by Congress, for any fiscal year after fiscal year 1994,[5] paragraph (2) of section 9(b) requires the Commission to revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect changes in the amount appropriated for that fiscal year for the performance of the Commission's enforcement, policy and rulemaking, information services, and international activities.[6] Such increases or decreases shall also reflect unexpected increases or decreases in the number of licensees or units subject to regulatory fees.[7]

5. Second, amendments to the schedule may also be made to reflect other changes and factors. Paragraph (3) of section 9(b) provides that, "[i]n addition to the adjustments required by paragraph (2), the Commission shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the schedule requires amendment to comply with the requirements of paragraph (1)(A) [of section 9(b)]."[8] Paragraph (1)(A) of section 9(b) provides that regulatory fees are to be derived by determining the full-time equivalent number of employees performing the specified regulatory activities within the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau, and other offices of the Commission, "adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors

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[5] 47 U.S.C. § 159(b)(1)(B). The government's 1994 fiscal year ("FY 1994") commenced on October 1, 1993, and ends September 30, 1994.

[6] See 47 U.S.C. § 159(b)(2). Public Law 103-121, enacted October 28, 1993, amended section 9(a) by redesignating the existing text as section 9(a)(1) and by adding a new provision at section 9(a)(2), which states, "The fees described in paragraph (1) of this subsection shall be collected only if, and only in the total amounts, required in Appropriations Acts." Pub. L. No. 103-121, title II, 107 Stat. 1226 (1993).

[7] 47 U.S.C. § 159(b)(2)(A).

[8] 47 U.S.C. § 159(b)(2).

as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest."[9] In making amendments to the schedule under paragraph (3), the Commission must also add, delete, or reclassify services in the schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.[10]

6. Before making changes under paragraph (3), however, certain preconditions must be satisfied. Pursuant to section 9(i), the Commission is required to utilize accounting systems necessary to making these adjustments[11] and must afford interested persons the opportunity to submit comments concerning the allocation of the costs of performing the functions described in section 9(a)(1) among the services in the schedule.[12] In addition, section 9(b)(4)(B) provides that the Commission must provide Congress advance notice of any amendment made pursuant to paragraph (3) not later than 90 days before the effective date of such amendment.[13]

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[9]47 U.S.C. § 159(b)(1)(A).

[10]47 U.S.C. § 159(b)(3). For example, section 6002(b)(2)(A) of the 1993 Budget Act amended section 332 of the Communications Act, creating a new comprehensive regulatory framework for all existing and future mobile services. As a result, existing private land mobile radio services may be reclassified due to the Commission's implementation of section 332, undoubtedly requiring amendments to the Schedule of Regulatory Fees. See Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rulemaking , 8 FCC Rcd 7988 (1993), Second Report and Order, FCC 94-31 (released March 4, 1994). We do not anticipate that these modifications to the schedule will result in current private land mobile radio licensees being subject to different fees until FY 1995 or later. See section 6002(c)(2)(B), (d)(3) of the 1993 Budget Act.

[11]The Commission must prepare an analysis of its progress in developing such systems in its annual report. 47 U.S.C. § 159(i).

[12]Toward this end, and pursuant to section 9(i), we plan to commence a separate proceeding, in connection with the assessment of fees for the 1995 fiscal year, through which we will seek comment from interested parties concerning the allocation of costs of performing the Commission's enforcement, policy and rulemaking, information services, and international functions among the regulated services. See 47 U.S.C. § 159(i), (b)(3).

[13]47 U.S.C. § 159(b)(4)(B).

7. For fiscal year 1994, we propose to adopt the fee amounts established by the Schedule of Regulatory Fees as approved by Congress. Adjustments to the statutory schedule required under paragraph (b)(2) may not take place until after the 1994 fiscal year, and thus we do not have authority during the current fiscal year to revise the schedule for purposes of matching the amounts actually appropriated for the current fiscal year.[14]

8. With regard to amendments under paragraph (3) of subsection (b), we similarly believe that the statutory scheme does not envision that the Commission would exercise its authority to amend the fee amounts in the schedule until at least after FY 1994. This interpretation is supported by the Conference Report, which states that "[t]he Commission is given authority to review these fees [in the Schedule of Regulatory Fees] after one year and make recommendations for their adjustment."[15] We also believe that this is a reasonable interpretation, since the regulatory fees established in the statutory schedule were established by Congress after reviewing information the Commission had supplied to it shortly before enactment of the statutory fee schedule. We do not think that Congress intended for the Commission immediately to make changes in the fees so recently considered by it.

9. Finally, our interpretation that subsection (b)(3) amendments should not be made until the next fiscal year is supported by other provisions of section 9. As noted, section 9(i) requires that, before implementing subsection (b)(3), the Commission must have provided an opportunity for public comment concerning the allocation of the Commission's costs among the services set forth in the statutory schedule. Section 9(i) therefore, does not in any way suggest that the Commission would have sought comments on such an accounting system, which Congress believed was "necessary to making the adjustments authorized by subsection (b)(3)," in time to collect fees in FY 1994. Similarly, as noted above, section 9(b)(4)(B) provides that any amendment made pursuant to subsection (b)(3) cannot become effective until 90 days after Congress is notified. Again, this additional three-month delay required by the statute indicates that Congress did not

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[14]On October 28, 1993, Public Law 103-121 was enacted, making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the fiscal year ending September 30, 1994, which appropriates for the Commission a total of $160,300,000. Of this amount $60,400,000 of offsetting collections must be assessed and collected pursuant to section 9.. Pub. L. No. 103-121, title II, 107 Stat. 1226 (1993).

[15] H.R. Rep. No. 213, 103d Cong., 1st Sess. 499 (1993) (emphasis added) (hereinafter "Conference Report").

anticipate that the Commission would amend the statutory schedule for FY 1994 collections.

10. Accordingly, we do not propose to make any changes in the amounts established by the statutory fee schedule at this time. Interested parties are invited instead to comment on a proposal to adopt the fee amounts set forth in the statutory Schedule of Regulatory Fees.

**B. Exemptions from Regulatory Fees**

11. Section 9(h) of the Communications Act provides that the regulatory fees established under section 9 "shall not be applicable to (1) governmental entities or nonprofit entities; or (2) to amateur radio operator licenses under part 97 of the Commission's regulations (47 C.F.R. Part 97)." 47 U.S.C. § 159(h). In addition, the Schedule of Regulatory Fees in section 9(g) and the statute's legislative history indicate that Congress intended to exempt other entities from regulatory fees. Accordingly, we propose to exempt the entities described below from regulatory fees. We invite comment on the following proposals.

**1. Governmental Entities**

12. Section 9(h) establishes an exemption from fees for "governmental entities." Similarly, section 1.1112(f) of the Commission's rules, which implements section 8(d)(1) of the Act, provides that no application filing fees are required for applicants, permittees or licensees who qualify as governmental entities. 47 C.F.R. § 1.1112(f). For purposes of the section 8 exemption, we have defined a governmental entity as any state, possession, city, county, town, village, municipal corporation or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs. Id.; see Fees I, 2 FCC Rcd at 959-60. We propose to apply this definition to governmental entities exempt from regulatory fees. While the section 8(d)(1) exemption is available only to governmental entities who apply to operate "licensed" radio facilities or services,[16] the exemptions under section 9 apply to all FCC-regulated services in which governmental entities operate. Therefore, our proposed regulatory fee exemption would apply to applicants, permittees, licensees, as well as any other regulatees who qualify as governmental entities.

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[16] See Fees I, 2 FCC Rcd at 960.

13. We must also adopt procedures for identifying regulatees that are governmental entities exempt from regulatory fees under section 9. Commenters should address the option of requiring entities, in lieu of the required fee, to file certifications (or other relevant information) as to their exempt status. Alternatively, for those governmental entities that have already established their governmental status for purposes of section 8 filing fees,[17] we may determine, to the extent possible, that no additional filings are necessary.

**2. Nonprofit Entities**

14. Section 9(h) also establishes an exemption from regulatory fees for all "nonprofit entities." In contrast, section 8(d)(1)(A), governing exemptions from application fees, exempts from application fees only those nonprofit entities licensed in Special Emergency Radio or Public Safety Radio services.[18] Further, the statutory exemption for "nonprofit entities" is clearly broader that the current exemption in the mass media services covering noncommercial, educational broadcast stations and limited categories of other facilities. See 47 C.F.R. § 1.1112.

15. In applying the exemption for these nonprofit entities under section 8, we have interpreted the term "nonprofit entities" to mean entities that receive nonprofit, tax exempt status under section 501 of the Internal revenue Code, 26 U.S.C. § 501.[19] We note that the version of the regulatory fees legislation that passed the House in the 102nd Congress would have limited the nonprofit entities qualifying for an exemption to those holding tax exempt status under paragraph (c)(3) of section 501 of the Internal Revenue Code.[20] The language of the statute, as enacted, contains no such limitation. We propose, therefore, to interpret the term "nonprofit entities" to include all nonprofit organizations exempt under section 501 generally, rather than including only those specified in section 501(c)(3).[21]

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[17] See 47 C.F.R. § 1.1112 note.

[18] See 47 U.S.C. § 158(d)(1)(A); see also Fees II, 5 FCC Rcd at 3573.

[19] See Fees II, 5 FCC Rcd at 3573.

[20] See H.R. 1674, 102d Cong., 1st sess, § 3(a), 137 Cong. Rec. H6752 (daily ed. Sept. 24, 1991).

[21] Our proposal would exempt, for example, certain nonprofit cooperative telephone and electric companies that are Commission regulatees. See 26 U.S.C. § 501(c)(12).

16. Under section 8 fee rules, an applicant claiming nonprofit status must include a current IRS Determination Letter documenting its nonprofit status.[32] We seek to avoid unnecessary paperwork, to the extent possible, by relying on existing information in Bureau files to identify regulatees that are nonprofit entities exempt from regulatory fees under section 9. However, since the exemption under section 8(d) only applies to nonprofit entities licensed in the Special Emergency Radio or Public Safety Radio services,[33] we propose to require any other regulatee seeking an exemption as a nonprofit entity to file, in lieu of the required fee, a current IRS Determination Letter documenting its nonprofit status.[34]

**3. Amateur Licensees**

17. Section 9(h) also provides a specific statutory exemption for "amateur radio operator licenses under part 97 of the Commission's regulations." 47 U.S.C. § 159(h)(2). This exemption is straight-forward and we propose to incorporate it into our fee rules. The Schedule of Regulatory Fees does establish a fee category for "Amateur vanity call-signs." At the present time we have no rules, regulations or procedures allowing for "vanity call-signs" in the Amateur Radio Service. However, we have proposed new rules in PR Docket No. 93-305 that would allow vanity call-signs. See Notice of Proposed Rulemaking, 9 FCC Rcd 105 (993). After those rules (if adopted) become effective, amateur licensees requesting vanity call-signs will be required to pay the statutory fee under section 9.

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[32]47 C.F.R. § 1.1112(b). An entity can request nonprofit tax exempt status by filing an application with the Internal Revenue Service. The IRS will issue a ruling or determination letter to the entity if its application and supporting documents establish that it meets the particular requirements under section 501. See 26 C.F.R. § 601.201(n) and § 1.501(a)-1.

[33]Below, we propose to exempt these public safety services altogether from regulatory fees.

[34]Such documentation would be filed on or before the payment due date for the relevant regulatory fee category. See part D.1. below regarding timing of payments. If proper documentation is not received or a claimed exemption is otherwise rejected, an entity failing to pay the proper fee on time may be subject to a 25 percent late-payment penalty. See part E.1. below.

**4. Noncommercial Educational Broadcasters**

18. The Schedule of Regulatory Fees in section 9(g) specifies that fees shall be collected from "VHF Commercial" television and "UHF Commercial" television licensees and permittees. 47 U.S.C. § 159(g) (emphasis added). Thus, regulatory fees are expressly not applicable to noncommercial educational television licensees and permittees.[25] However, the schedule does not specifically provide that regulatory fees apply only to "commercial" AM and FM radio licensees and permittees.[26] Similarly, the schedule does not expressly state that other Mass Media Services are subject to regulatory fees only if they are commercial in nature.[27] Nevertheless, based on the legislative history, we believe that Congress intended to exempt all noncommercial educational FM and AM radio licensees and permittees from regulatory fees. House Report 102-207, which is incorporated by reference in the legislative history of section 9, states that "[t]he legislation includes as 'feeable' all entities regulated by the FCC, with the exemption of . . . noncommercial users."[28] The House Report states further that "public television and radio licensees were exempted from user fees. Since these licensees were exempted in the public interest, it is appropriate to fund these functions

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[25]We also note that there is no specified fee category for the Instructional Television Fixed Services ("ITFS"). As discussed below, we believe that Congress intended that regulatory fees would not be applied to this "noncommercial" service. Therefore, ITFS licensees will be exempt from regulatory fees.

[26]We also note that the schedule includes Class D FM radio stations which are, by definition, noncommercial stations. See 47 C.F.R. Part 73, Subpart C.

[27]Specifically, the schedule establishes fees for "AM radio" stations; "FM radio" stations; "Low Power TV, TV Translator, and TV Booster" stations; "Broadcast Auxiliary" services; and "International (HF) Broadcast" stations.

[28]H.R. Rep. No. 207, 102d Cong., 1st Sess. 11 (1991) (hereinafter "House Report"). The Conference report states that "the fee provisions contained in this section are virtually identical to those contained in H.R. 1674, which passed the House in 1991." Conference Report at 499; see also 137 Cong. Rec. H6754-58 (Daily ed. sept. 24, 1991). The Conference report states further that "[t]o the extent applicable, the appropriate provisions of the house report [H.R. Rep. No. 102-207] are incorporated herein by reference." Conference report at 499.

with general revenues, not user fees."[29] By comparison, we also note that Congress exempted noncommercial FM and AM radio broadcast facilities from application filing fees.[30] We therefore propose to exempt from regulatory fees FM radio, AM radio and television licensees and permittees qualifying as noncommercial educational stations.[31]

19. Similarly, we believe that Congress intended to exempt noncommercial secondary and auxiliary broadcast services, such as low power television ("LPTV") stations, television translators and boosters, remote pickup stations and intercity relay stations.[32] This interpretation is consistent with our interpretation of the application fee provisions in section 8. As we stated in Fees I Reconsideration, the congressional exemption for noncommercial applicants was apparently intended to enhance the financial support for these services beyond that provided by the Corporation for Public Broadcasting ("CPB") and National Telecommunications Information Administration ("NTIA") facilities grants. 3 FCC Rcd at 5988. We stated further that "exacting fees from noncommercial educational applicants would dilute the financial support offered by Congress" and that such a concern applies to translator and LPTV applicants that propose to operate as noncommercial as noncommercial stations and that are constructed with NTIA grants. Id. Accordingly, we propose to utilize our current noncommercial exemption for LPTV and translator stations for regulatory fees.[33] We also propose to utilize this fee exemption for boosters, auxiliary broadcast services, and other Mass Media, Common Carrier or Private Radio

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[29]House Report at 16; see also 137 Cong. Rec. at H6755 (Sept. 24, 1991) (Statement of Rep. Markey); House Report at 21-22 (describing the radio and television stations, "other than those stations licensed as noncommercial, educational stations," subject to regulatory fees).

[30]See 47 U.S.C. § 158(g); Fees I, 2 FCC Rcd at 959.

[31]See 47 C.F.R. § 1.1112(c), (e). An AM licensee claiming a noncommercial exemption must be licensed as a noncommercial educational facility.

[32]We note that the schedule does not specify FM translators and FM boosters in the fee categories associated with Part 74. See n. 52, below. In the event that we later include FM translators and boosters with the other Part 74 fee categories, the proposal outlined here with regard to a noncommercial exemption would be applicable.

[33]See 47 C.F.R. § 1.1112(d), (e).

authorizations used in conjunction with qualifying noncommercial educational radio, television, or instructional services.[34]

20. Finally, it does not appear that Congress intended that a noncommercial exemption for regulatory fees be available to international short-wave broadcast stations. As was the case when we were implementing section 8, we do not intend to provide a noncommercial exemption for international broadcast licensees.[35] Like LPTV and translator stations, the regulatory fees created by Congress are not limited to commercial international broadcasters. However, unlike LPTV and translator stations, the government does not provide financial support through CPB and NTIA facilities grants. Thus, we tentatively conclude that the considerations leading us to propose an exemption for noncommercial educational LPTV and translator stations are not present with respect to international shortwave broadcast stations.[36]

21. As with the exemption for governmental and nonprofit entities, to avoid unnecessary paperwork to the extent possible, we propose to rely on information currently in Bureau files to identify most noncommercial licensees and permittees. However, where necessary, we reserve the option of requiring such entities, in lieu of paying the required fee, to file certifications (and other relevant information) as to their noncommercial status.[37] If additional information beyond a certification is requested, it would be done on a case-by-case basis and such information would have to show that the entity qualifies under our rules for the noncommercial exemption.

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[34]See Fees I, 2 FCC Rcd at 959. We thus propose to extend the exemption to noncommercial services used in conjunction with ITFS facilities, which are exempted. See 47 C.F.R. § 1.1112(e)(4).

[35]See Fees II Reconsideration, 6 FCC Rcd at 5925.

[36]We note, moreover, that since we denied an exemption for international broadcaster application fees in our 1991 Fees I Reconsideration Order, 6 FCC Rcd at 5925, Congress undoubtedly was aware that many major international licensees were noncommercial and were not exempt under our application fee rules.

[37]Entities claiming an exemption would be required to file this information on or before the payment due date for the relevant regulatory fee category. See part D.1. below regarding timing of payments. If a showing is not properly documented or a claimed exemption is otherwise rejected, an entity failing to pay the proper fee on time may be subject to a 25 percent late-payment penalty. See part E.1. below.

**5. Public Safety Services**

22. The Schedule of Regulatory Fees does not list specific Private Radio services under the category of "Shared use services." See 47 U.S.C. § 159(g). Absent an exemption, therefore, all such Private Radio services and authorizations are subject to the $7.00 annual regulatory fee. In this regard, however, the legislative history clearly states that Congress intended to exempt public safety licensees from regulatory fees. See House Report at 11 and 16. As with noncommercial and amateur licensees, the House Report states that public safety users are "exempted in the public interest" and that "it is appropriate to fund these functions with general revenues, and not user fees." Id. at 16. See also 137 Cong. Rec. H6755 (daily ed. September 24, 1991) (statement of Rep. Markey).

23. We note that under section 8(d), licensees in the Special Emergency Radio or Public Safety Radio services qualify for an application fee exemption only if they are governmental entities or nonprofit entities. See 47 U.S.C. § 158(d)(1). It does not appear that Congress intended to similarly limit the exception for regulatory fees. Governmental entities and nonprofit entities are provided a blanket exemption in section 9(h) for all regulated services, see id. § 159(h)(1), and the legislative history refers to a "public safety" exemption independently of the governmental and nonprofit exemptions. Accordingly, we propose to exempt all licensees in the Public Safety Radio and Special Emergency Radio Services from regulatory fees, but we also seek comment on whether the exemption should be limited to governmental and nonprofit entities, which are explicitly mentioned in the statute."

**C. Waivers, Reductions and Deferments of Regulatory Fees**

24. Section 9(d) states that "[t]he Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest." 47 U.S.C. § 159(d). There is little legislative history to guide us in interpreting this waiver authority,[35] but this provision is

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[34] See 47 C.F.R. Part 90, Subparts B and C.

[35] The House Report accompanying H.R. 1674 states that "[t]o further ensure fair administration of the user fee proposal, H.R. 1674... grants the Commission authority to waive certain fees in a specific instance if such action would promote the public interest." House Report at 17.

similar to section 8(d)(2),[40] which we have interpreted narrowly. We stated that, under section 8(d)(2), we would permit waivers or deferments on a case-by-case basis in extraordinary and compelling circumstances upon a showing that a waiver or deferment would override the public interest in reimbursing the Commission for its regulatory costs.[41] We propose to apply this same interpretation to our implementation of section 9(d) and thus propose to grant waivers, reductions or deferments of regulatory fees only in such unusual circumstances.

25. As discussed below, small regulatory fees must be paid at the time applications are filed. When regulatory fees are due at the same time an application is filed, we propose, when processing requests for regulatory fee waivers, reductions or deferments, to use procedures similar to those now used for application fee waiver requests. See 47 C.F.R. § 1.1115(e). Applicants seeking application fee waivers must submit both the request for waiver and the required fee, accompanied by the required form(s). Applications that do not include these materials are dismissed in accordance with section 1.1107 of the rules. For regulatory fees that are supposed to accompany applications, we would also require regulatees seeking a waiver or reduction to submit their regulatory fee payment with their waiver request. This would ensure that the processing of any pending application is not delayed while a waiver or reduction request is pending. Similarly, for standard regulatory fees that are due on a certain date, we propose to require that the appropriate regulatory fee accompany any waiver or reduction request. This would ensure efficient collections in situations where a waiver or reduction is not warranted and would allow the requestor to avoid a late-payment penalty if its request were denied. The regulatory fees submitted would be refunded later if a waiver or reduction were granted. Requests for deferment would have to be filed and approved before the payment due date in order to avoid late-payment penalties.

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[40]Section 8(d)(2) does not specifically grant authority to "reduce" the payment of an application fee.

[41]See Fees I, 2 FCC Rcd at 961; see also id. at 954 and Fees I Notice, 51 Fed. Reg. at 25801 ("the Commission may -- on a case by case basis -- grant waivers or deferrals to specific applicants upon a showing of extraordinary and compelling circumstances"), citing H.R. Rep. No. 453, 99th Cong., 1st Sess. 423 (1985).

**D. Procedures for Payment of Regulatory Fees**

**1. Timing of Payments**

26. Section 9(f) of the Communications Act provides that the Commission's regulations implementing regulatory fees must "permit payment by installments in the case of fees in large amounts, and in the case of fees in small amounts, shall require the payment of the fee in advance for a number of years not to exceed the term of the license held by the payor." 47 U.S.C. § 159(f)(1). We propose to establish three classes of regulatory fees, each of which would be based on the size of the annual fee amount. The three classes of regulatory fees are standard fees, small fees and large fees. The class of the fee would determine the timing of the regulatory fee payment. Pursuant to section 9(f), our regulations will permit regulatees subject to "large" fees to make two installment payments in FY 1994 (rather than a single payment). Regulatees subject to "small" fees will have to pay their fees for each year of their license term in advance at the beginning of the license term. Regulatees subject to standard fees would pay their regulatory fee, in full, on an annual basis.

**a. Annual Payments for Standard Fees**

27. We propose to classify most of the fee amounts which will be paid under section 9 as standard fees. Standard regulatory fees would be those that are neither "large" nor "small." (The proposed definitions of these terms are discussed below.) As noted above, standard fees are to be paid in full on an annual basis. We propose further that each licensee or regulatee required to pay a standard fee must pay the full amount specified for each relevant fee category by a date certain each year. The specific payment due dates for each regulatory fee category for the 1994 fiscal year will be announced in the Report and Order in this proceeding or in a Public Notice published in the Federal Register to be released well before the first payment due date. We anticipate that all regulatory fees will be collected as early as possible before the end of the fiscal year. In subsequent fiscal years, we intend to establish regular, fixed payment due dates for regulatory fees.

**b. Installment Payments for Large Fees**

28. Section 9(f) states that the Commission's regulations shall permit payment by installments for regulatory fees in "large amounts." The House Report mentioned that the purpose of this provision was "[t]o further ensure fair administration of the

user fee proposal."[42] However, nowhere in the statute or the legislative history did Congress define the term "large." Therefore, in promulgating regulations in accordance with section 9(f), we must first determine what constitutes a "large" fee. In carrying out this task, we seek to adopt a system for large fee installment payments that is fairly administered, is simple to apply, and enables the Commission to recover its regulatory costs on a timely basis.

29. With these congressional and administrative goals in mind, we have analyzed the amounts set forth in the statutory fee schedule that we propose to use for FY 1994 and have estimated the likely regulatory fee obligations for regulatees in various fee categories. For purposes of establishing eligibility criteria for regulatory fee installment payments, we propose generally to classify a fee amount as "large" if it greatly exceeds the average annual fee for regulatees in a particular category. Specifically, for some regulatory fee categories, we propose to establish a fixed annual amount which is based on the relative payment obligations of regulatees within that regulatory fee category. Those fees which are significantly higher than all others would be deemed large and entities who are required to pay significantly more than most other regulatees may elect to make two payments in FY 1994 instead of paying the entire amount all at once. For future years, we seek comment on whether large fee payors should be permitted to pay their annual regulatory fee in four or more installments.

30. We recognize that many entities hold multiple licenses or other authorizations or serve many areas, and that these regulatees may be required to pay what appear to be significant amounts solely as a result of the aggregation of their various regulatory fee amounts. We propose, however, that an entity's installment payment eligibility should not be based on its total regulatory fee payments because it happens to hold multiple licenses or authorizations or serve multiple areas. Instead, a regulatory fee would be deemed large based on the fee for each individual license, authorization or authorized service area. If, for example, the regulatory fee is large (as defined herein) for one or more of a regulatee's licenses and not for other licenses, the regulatee will be eligible for installment payments only for those large fee licenses and must pay the entire regulatory fee for all of the other licenses. We invite specific comment on whether, for purposes of determining whether fees are large, telephone local exchange carriers should be assessed fees on an operating company or holding company level.

31. In applying the method described above, we propose below, in the section explaining the regulatory fee categories, several

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[42]House Report at 17.

"large" fee amounts that would be eligible for installment payments. In sum, for the 1994 fiscal year we have identified the following fee amounts which appear relatively large:

| Regulatory Fee Category | Large Fee |
|---|---|
| VHF and UHF Commercial Television Station | above $12,000 |
| Cable Television System | above $18,500 |
| Inter-Exchange Carrier | above $500,000 |
| Local Exchange Carrier Holding Co. | above $700,000 |

As explained below, when compared with the amounts to be paid by the average regulatee in these categories, these regulatory fee amounts appear significantly higher.[43]

32. If a regulatee finds it necessary to pay its large regulatory fee by installments, we propose to establish fixed dates on which installment payments will be due. For the 1994 fiscal year, any eligible regulatee that elects to pay a large fee in installments shall make half of its payment on a date to be specified. We also shall specify the date for the second and final installment. Payments in their entirety will be due prior to the end of this fiscal year. As with standard fees, the payment due dates for each large fee category for the 1994 fiscal year will be announced in the Report and Order in this proceeding or in a Public Notice published in the Federal Register to be released well before the first installment payment due date.

33. To recover the additional costs of maintaining installment payment plans, we propose that each installment payment would be subject to an additional processing charge to cover administrative costs. We tentatively propose that these fees will be $50.00 per payment. Installment payments received after the due date for standard regulatory fees would be subject to interest payments.[44] Further, as discussed below, late installment payments would be subject to a 25 percent late fee and applications filed by delinquent payors would be subject to dismissal. We would also reserve the right to require a regulatee to pay its regulatory fees in a single, full payment if one or more installment payments has not been received in a timely manner.

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[43] See Appendix C. In each case, we will use the most current relevant data at the time we establish the required fee payment for the current fiscal year.

[44] See 4 C.F.R. Part 102; 47 C.F.R. § 1.1940(c).

**c. Advance Payments for Small Fees**

34. Section 9(f) states that the Commission's regulations shall require the payment of "small" regulatory fees "in advance for a number of years not to exceed the term of the license held by the payor." 47 U.S.C. § 159(f)(1). We note that the version of this provision passed by the House in the 102nd Congress stated that "If the Commission determines that, because of the small amount of fee involved relative to the cost of annual collection, it would be inefficient to collect any regulatory fee each year, such rules and regulations may also require the payment of the fee in advance for a number of years not to exceed the term of the license held by the payor."[45] The modified language contained in section 9(f) now mandates the payment of small regulatory fees in advance. The enacted language also deleted the requirement that the Commission make an affirmative determination that it would be inefficient to collect a specific regulatory fee each year because of its relatively small amount. We note further that the House Report mentioned that, because of the relatively small annual fee amounts in the Private Radio Services, license applicants (including renewal applicants) would pay a fee covering the entire license term, with only a percentage of licensees paying a fee in any one year. See House Report at 17.

35. Based on the legislative history, for the 1994 fiscal year we propose to require advance payment for regulatory fees in Private Radio services. Due to the large volume of Private Radio licensees and other authorizations, we believe that assessment and collection of these small regulatory fees on an annual basis would be very costly and would likely result in a larger number of delinquent payments unless such payments coincide with the filing of new, renewal or reinstatement applications. We do not propose at this time to require a similar advance payment program for any fees for Mass Media and Common Carrier services. However, we reserve the option of requiring advance payment of regulatory fees for other fee categories in subsequent fiscal years if we determine that these fees are small, especially if it appears that it would be inefficient to collect such fees on an annual basis.

36. We propose to require those who are assessed a small regulatory fee to pay their annual fee for their entire license or authorization term. For example, regulatees in the private, shared use services would pay a regulatory fee of $35.00 per license to cover the entire five-year term of their license or authorization. (Those with a ten-year license or authorization will pay $70.00.) These regulatory fees would generally be paid concurrently with an applicant's new, renewal or reinstatement

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[45] H.R. 1674, 102d Cong., 1st Sess. § 3(a), 137 Cong. Rec. H6752 (daily ed. Sept. 24, 1991). See also House Report at 4.

application. We propose to require persons holding lifetime restricted radiotelephone and radio operator licenses or permits for commercial use to pay a one-time regulatory fee of $105.00 to cover the entire lifetime license or permit term. We note that, due to the staggered expiration dates of private radio authorizations, only a percentage of these regulatees would be paying their regulatory fees in any one year. If the fee amount is adjusted subsequent to a regulatee's advance payment, the regulatee would not be subject to the new fee amount until its next renewal application and regulatory fee is due. Regulatees thus would only be subject to the fee amounts in effect for the fiscal year in which their application is filed. Finally, for the first round of fee payments for regulatees in the private radio service, we may require payments subsequent to the time when the application is filed."

**2. Method of Payment and Payment Location**

37. As noted above, we propose to use the same general requirements and procedures for the payment of both application fees and regulatory fees. First, in addition to the payment methods in section 1.1108(a) of our Rules, we propose to allow the filing of fee payments by electronic means. We will first allow electronic fee payments only on a limited, experimental basis. We anticipate, however, that in the foreseeable future we will be accepting all fees and other monies to be paid to the Commission through electronic means.[47] We also propose to allow payment by credit card in some circumstances. The credit cards which will be accepted are VISA and Mastercard. When a credit card is employed for a fee payment, the entire fee payment must be made by a single credit card transaction.

38. Second, we propose to allow the use of one payment instrument to cover multiple standard regulatory fee payments and, where applicable, multiple installments.[48] Our new remittance form and

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"We note that some existing private radio licensees will be reclassified as Commercial Mobile Radio Service (CMRS) providers pursuant to section 332 of the Communications Act. 47 U.S.C. § 332(c),(d). See n. 10, above. To the extent that private radio licensees will have paid their "small" fees in advance for the term of their licenses, we would apply the advance payment toward any new annual regulatory fee requirement imposed upon such licensees as a result of being reclassified as CMRS.

"Accordingly, we are also proposing below to amend our rules with respect to electronic filing of application fees.

"Since small regulatory fees will be paid at the same time as application fees, our current application fee filing procedures requiring one instrument per application would apply.

payment procedures would allow individual entities to use a single payment method or instrument to pay the standard regulatory fees for each Mass Media and Common Carrier license or authorization it holds. Each individual regulatee will be solely responsible for accurately accounting for and listing each license or authorization and the number of subscribers, antennas, access lines, or other relevant units, and for paying the proper cumulative amount by the single instrument. As discussed below, any omission or payment deficiency may result in a penalty, dismissal of applications, and/or license revocation.

39. Finally, in order to efficiently process Mass Media and Common Carrier regulatory fee payments, we propose to set up a single lockbox at the lockbox bank, separate from the lockboxes established for applications and application fees. Regulatory fee payments for both services are to be submitted to this lockbox. This will allow regulatees in the Mass Media and Common Carrier services to combine payments for different fee categories. However, since regulatory fees for Private Radio services will generally be due at the same time as applications and application fees, these regulatory fees must be paid to the same lockbox as the application fees. Because they are paid to different lockboxes, Private Radio fees may not be combined with Mass Media and Common Carrier regulatory fees. We request comment on the above proposals.

**E. Enforcement of Regulatory Fees Statute and Regulations**

40. Section 9(c) of the Communication Act provides the Commission with three methods of enforcing the statute: monetary penalties for late payment, dismissal of applications, and revocation. 47 U.S.C. § 159(c). In order to ensure an effective regulatory fee collection program, we intend to use these enforcement mechanisms to the fullest extent possible. In addition, the Commission will pursue all available remedies against delinquent payors under the Debt Collection Act, 31 U.S.C. § 3711 et seq., and related statutory provisions. We invite comment on the proposals which follow.

**1. Penalties for Late Payment**

41. Section 9(c)(1) states:

> The Commission shall prescribe by regulation an additional charge which shall be assessed as a penalty for late payment of fees required by subsection (a) of

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However, we are proposing below to modify the one-instrument/one-application rule to allow one payment instrument to cover multiple applications filed in the same bank lockbox.

this section. Such penalty shall be 25 percent of the amount of the fee which was not paid in a timely manner.

47 U.S.C. § 159(c)(1). We propose to incorporate section 9(c)(1) into our rules. Thus, we will charge a 25 percent penalty to any regulatee that fails to pay its regulatory fee (or installment) in a timely manner. We intend to consider a payment to be late, or "not paid in a timely manner," if the full regulatory fee amount or the entire installment payment is not received at the lockbox bank by the due date specified by the Commission. A payment would also be considered late if the payment (check, bank draft or other means) is not collectible.[49] If only a portion of the required regulatory fee is paid in a timely manner, a 25 percent penalty will be assessed against the shortage. If an installment payment is not received by the established date, a 25 percent penalty will be assessed against any amount that is late. As noted above, the Commission in its discretion may, following one or more late installment payments, require a regulatee to pay the balance of its regulatory fee installment payments by a date certain, in addition to a 25 percent penalty.

42. If a regulatory fee is not paid in a timely manner, we will make every effort to identify delinquent payors and to notify them of their delinquency as soon as possible. This notice will, pursuant to the statute, automatically assess the 25 percent penalty and, as proposed below, will require the delinquent payor to pay the fee and penalty, may subject the delinquent payors' applications to dismissal, and may require a delinquent payor to show cause why its existing instruments of authorization should not be subject to revocation.

**2. Dismissal of Application**

43. Section 9(c)(2) authorizes the Commission to dismiss any application, group of applications or other filings for failure to pay in a timely manner any fee or penalty under section 9. 47 U.S.C. § 159(c)(2). Because application fees and small regulatory fees paid in advance are to be combined, we propose that, where a regulatory fee is required to accompany a regulatee's new or renewal application (as is the case with the small fees), the application will be returned if the regulatory fee is not included. If the application that must be accompanied by a regulatory fee is a mutually exclusive application with a filing deadline (or any other application that must be filed by a

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[49] We will also continue our policy of not accepting instruments other than cashier's checks for payors who are notified that other payment methods are unacceptable. See Fees II, 5 FCC Rcd at 3571.

date certain), we also propose to dismiss the application if not accompanied by the regulatory fee. This will have no impact on any other types of payors. If any application that included an advance regulatory fee payment is not granted, we propose to refund any advance payment, but not any late-payment penalty which was also assessed.

**3. Revocation**

44. Section 9(c)(3) provides that, "[i]n addition to or in lieu of" the 25 percent penalty required by section 9(c)(1) and the application(s) dismissal authorized by section 9(c)(2), "the Commission may revoke any instrument of authorization held by any entity that has failed to make payment of a regulatory fee assessed pursuant to this section." 47 U.S.C. § 159(c)(3). The statute specifies that the Commission must provide notice to the licensee of the Commission's intent to take such action and must allow the licensee at least 30 days to either pay the fee or show cause why the fee does not apply to the licensee or should otherwise be waived or payment deferred. A hearing is not required under this revocation provision unless the licensee's response presents a "substantial and material question of fact."[50] In any case where a hearing is conducted, it shall be based on written evidence only, and the burden of proceeding with the introduction of evidence and the burden of proof shall be on the licensee.[51] Unless the licensee "substantially prevails" in the hearing, the Commission may assess costs against the licensee. 47 U.S.C. § 159(c)(3). A revocation order will not become final until the licensee has exhausted its right to judicial review under section 402(b)(5) of the Communications Act (47 U.S.C. § 402(b)(5)).

45. While we do not foresee that revocation will be necessary except in egregious circumstances, we reserve the right to invoke these abbreviated revocation proceedings against any delinquent regulatee. We note that this provision requires only that a regulatee "has failed to make payment of a regulatory fee." Id. (emphasis added). It does not require "willful or repeated" failure to pay. Compare 47 U.S.C. § 312(a)(3), (4) and (7). Therefore, if we deem it appropriate, our notification to a regulatee that is delinquent with its regulatory fee payment will take the form of an "Order to Show Cause," allowing the regulatee to either pay the fee or show cause why the fee does not apply or should otherwise be waived or payment deferred. We propose to provide a 60 day period for a reply by the subject regulatee in order to afford an adequate opportunity for the regulatee to

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[50] Compare 47 U.S.C. § 309(e).

[51] Compare 47 U.S.C. § 312(d).

obtain any necessary financing to cover its fee payment and to otherwise prepare its response.

#### 4. Debt Collection Act Remedies

46. In addition to the above-described remedies under section 9(c), we intend to invoke our authority under the Debt Collection Act against any person or entity failing to meet its regulatory fee payment obligations. See 31 U.S.C. § 3711 et seq. We believe that such action would help ensure and expedite the collection of any outstanding regulatory fee payments. In accordance with Part 1, Subpart O of our rules (47 C.F.R. §§ 1.1901-1.1952), we intend to pursue the collection of outstanding debts arising from regulatory fee payment failures at the same time we proceed against the debtor with the other sanctions authorized by section 9(c). Moreover, where circumstances require, we will refer outstanding debts to the Internal Revenue Service. See 31 U.S.C. § 3720A. Included in the recovery of the unpaid fee will be the assessment of interest on the debt due, penalty for nonpayment and the full cost incurred by the Federal government in the collection process. See 31 U.S.C. § 3717. In sum, Commission regulatees should be on notice that failure to make timely fee payments may result in substantial penalties, including the loss of operating authority.

### F. Explanation of Regulatory Fee Categories

47. The following explanation of regulatory fee categories is based on the categories established by the Schedule of Regulatory Fees in section 9(g) of the Communications Act. 47 U.S.C. § 159(g). Where regulatory fee categories from the schedule need additional interpretation or clarification, we have relied on the legislative history of section 9 and our own experience in establishing and regulating the various services. We also note that the categories and amounts set out in the schedule may, by the next fiscal year and in subsequent fiscal years, be amended, adjusted or modified to reflect changes in the Commission's appropriations, its costs and changes in the nature of the Commission's regulated services. See 47 U.S.C. § 159(b)(2), (3).

#### 1. Private Radio Bureau

48. The two levels of statutory fees for Private Radio services, exclusive use service and shared use services, were established on the basis that those licensees who generally receive a higher quality communications channel, due to exclusive or lightly shared frequency assignments, will pay a higher fee than those who share marginal quality channels. House Report at 17. In addition, as noted above, because of the relatively small annual

fee amounts in the Private Radio Services, applicants for new licenses, reinstatements and renewal will be required to pay a regulatory fee covering an entire license term, with only a percentage of all licensees paying a regulatory fee in any one year. We intend to use our computer data bases for verifying the identity of regulatees subject to regulatory fees and the number of licenses, permits or other authorizations subject to fees.

49. Applications for modification or assignment of an existing authorization will not require payment of a regulatory fee. The expiration date of these authorizations will not reflect a new license term when either modifications or assignments are processed. In an effort to reduce public confusion, the Commission has provided separate lockbox addresses for these applications.

**a. Exclusive Use Services**

50. Land Mobile. Regulatees covered under this category include those authorized under Part 90 of the Commission's Rules to provide limited access private radio service that allows high quality voice or digital communications between vehicles or to fixed stations to further the business activities of the licensee. These services, using the 220-222 MHz band and frequencies at 470 MHz and above, may be offered on a private carrier basis in the Specialized Mobile Radio Services (SMRS). These land mobile licensees are subject to a regulatory fee of $16.00 per license per year. They will pay either a $80.00 or $160.00 regulatory fee (depending whether their license term is 5 or 10 years).

51. Microwave. Private microwave systems, authorized under part 94 of the Commission's Rules, provide telecommunications services between fixed points and are often used to relay data and to control railroad, pipeline and utility equipment. Microwave licensees are required to pay the total regulatory fee for the entire term of their license when filing their initial or renewal application. The annual fee is $16.00. Microwave licensees will pay an $80.00 regulatory fee to cover each five year term.

52. Interactive Video Data Service (IVDS). IVDS is a two-way point-to-multi-point radio service which provides information about products and services, and allows subscribers to respond through their television sets. IVDS is offered on a private carrier basis and is authorized under Part 95, Subpart F of the Commission's Rules. IVDS licensees will be assessed a regulatory fee of $80.00 per license to cover each five year license term ($16.00 per year).

**b. Shared Use Services and Other Authorizations**

53. The specific categories of shared-use services listed below are not on the statutory schedule but were listed in the House Report. As discussed above, we propose that emergency and public safety services would be exempted from regulatory fees.

54. Aviation (Aircraft and Ground Stations). The aircraft radio service provides communications between aircraft or from aircraft to ground stations and includes frequencies used to communicate with air traffic control facilities. See generally 47 C.F.R. Part 87. Aviation aircraft stations are subject to a regulatory fee of $7.00 per year per station (the total fee of $70.00 per station for ten year license term is to be paid at the time a renewal or new application is filed). Aviation ground stations provide communications to aircraft for weather or landing information, or for logistical support to aircraft operations. These stations are subject to a regulatory fee of $7.00 per year per license (the total fee of $35.00 per license for five year license term is to be paid at the time a renewal or new application is filed).

55. Marine (Coast and Ship Stations). Marine coast stations are land-based stations in the maritime services, authorized under Part 80 of our rules, which provide communications services to ships and other watercraft in coastal and inland waterways. Coast stations are subject to a $35.00 regulatory fee for each license, covering the five year license term ($7.00 per year). Marine ship stations, also authorized under Part 80, provide telecommunications between watercraft or between watercraft and shore-based stations. Shipboard radio installations are required by domestic and international law for large passenger or cargo vessels. Radio equipment may be voluntarily installed on smaller vessels, such as recreational boats. Ship stations are assessed a $70.00 regulatory fee per station, covering the ten year license term ($7.00 per year) and is to be paid at the same time a license renewal application or new application is filed.

56. General Mobile Radio Service (GMRS). GMRS, authorized under Part 95 of the Rules, is a land mobile radio service that provides personal and limited business communications between vehicles or to fixed stations for short-range, two-way communications. Each GMRS license is subject to a $35.00 regulatory fee, which covers the five year license term ($7.00 per year) and is to be paid at the same time a license renewal application or new application is filed.

57. Other Land Mobile. Licensees in the land mobile services not covered in the exclusive use category provide one or two way communications between vehicles, persons or to fixed stations on a shared basis. These services, authorized under Part 90 of the Rules, include radiolocation services, private carrier paging, industrial radio services and land transportation radio services. Regulatory fees will be assessed on a per license basis with the

$35.00 fee covering the five year license term ($7.00 per year) and is to be paid at the same time a license renewal application or new application is filed.

58. Commercial Radio Operators. Commercial Radio Operator licensees and individuals holding Restricted Permits and Radiotelephone Operator Licenses are authorized for various classes of radio stations. License endorsements also provide for specific purposes, e.g., operation of global maritime distress and safety equipment. See 47 C.F.R. Part 13. The $7.00 annual regulatory fee for commercial radio operators will be assessed on a per license basis and, at the time of application or renewal, the total $35.00 fee will be paid to cover a five-year license term. Restricted Permittees and General Radiotelephone Operator Licensees will be assessed a one-time regulatory fee of $105.00 to cover the lifetime license or permit term.

**c. Amateur Vanity Call-Signs**

59. If Part 97 of the Rules is amended by the Commission to authorize the use of vanity call-signs, amateur radio operators would be able to request a specific call-sign. See Notice of Proposed Rulemaking in PR Docket No. 93-305, FCC 93-545, 9 FCC Rcd 105 (1993). Each amateur licensee with a vanity call-sign will be assessed a regulatory fee of $7.00 per year. The total fee of $70.00 will cover the ten year license term during which the call sign will be in use. The first 10-year fee must be paid at the time a request for vanity call-sign(s) is made. If a requested vanity call-sign is not available or otherwise cannot be issued to the requestor, the regulatory fee will be refunded since amateurs are expressly exempt under the statute from regulatory fees, unless they have received their vanity call-sign.

**2. Mass Media Bureau**

60. The regulatory fees for Mass Media services generally apply to broadcast licensees and permittees and to other regulatees.[53]

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[53]We note that some Mass Media services, such as the direct broadcast satellite service ("DBS"), the Instructional Television Fixed Service ("ITFS"), and FM translators and boosters were not specifically listed in the statutory schedule. As noted above, we believe that ITFS was excluded because of its general educational noncommercial status. We also believe that the omission of DBS and FM translators and boosters was inadvertent and that Congress did not intend to exempt all DBS permittees and licensees and licensees of FM translators and boosters from regulatory fees as these services result in the Commission incurring costs for necessary regulatory functions. Since these

As discussed fully above, we propose to exempt noncommercial educational broadcasters from regulatory fees. We intend to use, to the extent possible, the Bureau's computer data bases for verifying the identity of regulatees subject to regulatory fees and the number of licenses, permits or other authorizations subject to fees.

**a. AM Radio Stations**

61. Class A. Class A AM radio stations are unlimited time stations operating on a clear channel and designed to render primary and secondary service over an extended service area and at relatively long distances from their transmitters. Class A stations' primary service areas are protected from objectionable interference from other stations on the same and adjacent channels, with secondary service areas protected from interference from other stations on the same channel. The operating power shall not be less than 10 kW nor more than 50 kW. For FY 1994, each licensee of a Class A AM station will be assessed a $900.00 annual regulatory fee.[33]

62. Class B. Class B AM radio stations are unlimited time stations rendering service only over a primary service area. These stations are authorized to operate with a minimum power of 0.25 kW (or, if less than 0.25 kW, an equivalent RMS antenna field of at least 141 mV/m at 1 km) and a maximum power of 50 kW (or 10 kW for stations that are authorized to operate in the 1605-1705 kHz band). For FY 1994, each licensee of a Class B AM station will be assessed a $500.00 annual regulatory fee.

63. Class C. Class C AM radio stations operate on local channels and are designed to render service only over a primary service area that may be reduced as a consequence of interference. These stations are authorized to operate at not less than 0.25 kW, nor more than 1 kW. Class C stations that were previously licensed to operate with 0.1 kW may continue to do so under our rules. For FY 1994, each licensee of a Class C AM station will be assessed a $200.00 annual regulatory fee.

63. Class D. Class D AM radio stations operate either daytime, limited time or unlimited time with nighttime power less than

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services are not on the statutory schedule, we propose not to assess fees for these services during the 1994 fiscal year. However, pursuant to our authority in section 9(b)(3) to modify the schedule, we intend to add regulatory fee categories for DBS licenses and for FM translators and boosters to be assessed and collected during the 1995 fiscal year.

[33]Regulatees are to pay the fee to which their facility is subject on the date the fee is due.

0.25 kW and an equivalent RMS antenna field of less than 141 mV/m at one km. Class D stations operate with daytime powers not less than 0.25 kW nor more than 50 kW. Nighttime operations of Class D stations are not afforded protection and must protect all Class A and Class B operations during nighttime hours. For FY 1994, each licensee of a Class D AM station will be assessed a $250.00 annual regulatory fee.

64. AM Construction Permits. For FY 1994, persons holding a construction permit for a any class of a new AM station are subject to a $100.00 annual regulatory fee for each outstanding permit. Upon issuance of an operating license to cover the construction permit, this fee is no longer applicable. Instead, licensees will pay a regulatory fee amount based upon the designated class of the licensed station, as described above, as of the date the regulatory fee payment is due.

**b. FM Radio Stations**

65. Licensed Stations. FM radio stations must meet the location, power and antenna height requirements for stations designated as Classes C, C1, C2, or B, as set forth in sections 73.205, 73.210 and 73.211 of the Commission's Rules. For FY 1994, each commercial licensee of a Class C, C1, C2 or B FM station will be assessed a $900.00 annual regulatory fee per license. FM radio stations meeting the location, power and antenna height requirements for stations designated as Classes A, B1, or C3, as set forth in the Commission's rules, have a smaller coverage area. Thus, for FY 1994, each commercial licensee for a Class A, B1, or C3 FM station will be assessed a $600.00 annual regulatory fee per license.

66. FM Construction Permits. Persons holding a construction permit for a any class of a new FM station, except Class D, are subject to a $500.00 annual regulatory fee per outstanding permit in FY 1994. Upon issuance of an operating license to cover the construction permit, this fee is no longer applicable. Instead, licensees will pay a regulatory fee based upon the designated class of the licensed station, as described above, as of the date the regulatory fee payment is due.

**c. Television Stations**

67. VHF and UHF Commercial Licenses. Commercial VHF and UHF television licensees will be assessed a regulatory fee amount based on the ranking of the station's market. Specifically, for FY 1994 these annual regulatory fees are as follows:

| | |
|---|---|
| VHF Commercial | |
| Markets 1 through 10 | $18,000.00 |
| Markets 11 through 25 | $16,000.00 |
| Markets 26 through 50 | $12,000.00 |

| | |
|---|---|
| Markets 51 through 100 | $8,000.00 |
| Remaining Markets | $5,000.00 |

UHF Commercial

| | |
|---|---|
| Markets 1 through 10 | $14,400.00 |
| Markets 11 through 25 | $12,800.00 |
| Markets 26 through 50 | $9,600.00 |
| Markets 51 through 100 | $6,400.00 |
| Remaining Markets | $4,000.00 |

Stations authorized as "satellite" television stations pursuant to note 5 of Section 73.3555 of the Commission's Rules (47 C.F.R. § 73.3555 note 5) will be assessed a fee on the same basis as other full power stations in the same market.

68. As discussed above, we propose to allow installment payments for these regulatory fees if a television licensee's annual fee exceeds $12,000. We propose that this amount be deemed large because it greatly exceeds the estimated average regulatory fee obligations to be incurred by most other television licensees. Specifically, according to our estimates, the 551 commercial VHF television licensees will pay an average fee of $8,826. Most VHF licensees (379, or 69 percent) will pay $8,000 or under in fiscal year 1994 and only 18.5 percent of VHF licensees will be asked to pay over $12,000.[34] Similarly, under the statutory schedule 561 commercial UHF television licensees will pay an average fee of $8,294. The vast majority of UHF licensees (406, or 72 percent) will pay under $10,000 in fiscal year 1994 and only 27.63 percent of UHF licensees will be asked to pay over $12,000. Thus, we tentatively conclude that television licensees subject to a regulatory fee above $12,000 will be automatically eligible to make two equal installment payments, subject to additional administrative and interest charges.

69. In determining a TV station's market rank, the Commission has traditionally relied on the Arbitron Company's publication "Television Markets and Ranking Guide." See, e.g, 47 C.F.R. §§ 73.658(k) note 1 (prime-time access rule). We note, however, that Arbitron has recently announced that it will no longer provide television ratings services. See Cooper, Arbitron Drops Local TV and Cable Ratings, Broadcasting & Cable, Oct. 25, 1993, at 45. It appears that Arbitron will cease publishing its annual Television Markets and Ranking Guide. Thus, we seek comment on whether we should rely on the latest Arbitron publication's rankings which would be placed in our rules (see, e.g., 47 C.F.R. § 76.51 (major television markets)), or should we use some other source (such as A.C. Nielsen) to determine a television station's market ranking each year for purposes of assessing regulatory fees. In this regard, we tentatively conclude that we will need

[34] See Appendix C, Table 1.

to rely on the most recent market rankings to assess fees each fiscal year because a static list in our rules may become outdated after a few years. Thus, any changes in market rankings may affect regulatory fee amounts for the following fiscal year.

70. Television Construction Permits. For FY 1994, persons holding a construction permit for a new VHF television station, in any size market, are subject to a $4,000.00 annual regulatory fee per outstanding permit. UHF construction permits for stations in any size market will be assessed a $3,200.00 annual regulatory fee. Upon issuance of an operating license to cover the construction permit, this construction permit fee is no longer applicable. Instead, licensees will pay a regulatory fee amount based upon the licensed station's market ranking, as described above.

**d. Low Power TV, TV Translator, and TV Booster Stations**

71. Under Part 74 of the Commission's Rules, low power UHF and VHF TV stations operate with a transmitter power output limited to 0.01kw for a UHF facility and, generally, 1kw for a VHF facility, and may retransmit the programs and signals of a full-power TV broadcast station, originate programming, and/or operate as a subscription service. TV translator stations are authorized to retransmit the programs and signals of TV broadcast stations without significantly altering the characteristic of the original signal other than its frequency and amplitude, for the purpose of providing TV reception to the general public. See 47 C.F.R. Part 74. TV booster stations are operated by the licensee of a full service TV broadcast station to retransmit the programs and signals of the licensee's station by amplifying and reradiating such signals, without significantly altering the characteristics of the original signal other than its amplitude. Id. For FY 1994, licensees of these secondary television broadcast stations will be assessed a $135.00 annual regulatory fee per license.

**e. Broadcast Auxiliary Stations**

72. Licensees of remote pickup stations, aural broadcast auxiliary stations, television broadcast auxiliary stations, and low power auxiliary stations, authorized under Part 74 of the Commission's Rules, will be assessed a $25.00 per license annual regulatory fee for FY 1994. These auxiliary stations are associated with a particular television or radio broadcast station. Hence, those licensees will be required to pay the required regulatory fees for each auxiliary license they hold. Individual users under 47 C.F.R. Subpart D, F and H will similarly have to pay the required regulatory fee for each auxiliary license they hold.

**f. International (HF) Broadcast Stations**

73. International broadcast stations are licensed to operate on frequencies in the 5,950 khz to 26,100 khz band to provide service to the general public in foreign countries. For FY 1994, each international broadcast licensee will be assessed an annual regulatory fee of $200.00 per license.

**3. Cable Services Bureau**

**a. Cable Antenna Relay Service**

74. Cable television antenna relay service ("CARS") stations are used to transmit television and related audio signals, signals of AM and FM broadcast stations and cablecasting from the point of reception to a terminal point from where the signals are distributed to the public by cable television systems. See 47 C.F.R. Part 78. For FY 1994, each CARS licensee will be assessed an annual regulatory fee of $220.00 per license.

**b. Cable Television Systems**

75. For FY 1994, each cable television system, as that term is defined in section 76.5 of our rules, will be assessed an annual regulatory fee of $370.00 per 1000 subscribers or any portion thereof.[55] Although the statutory schedule indicates that cable systems are to be assessed regulatory fees for every 1,000 subscribers, we do not believe that Congress intended to completely exempt systems with less than 1,000 subscribers. These smaller systems represent more than half of all cable systems and benefit from the Commission's regulatory activities. Accordingly, we tentatively conclude that cable systems with 1,000 or fewer subscribers will be assessed a fee of $370.00 per 1,000 subscribers or any portion thereof. We seek comment on this tentative conclusion.

76. We also seek comment on how to verify a cable television operator's regulatory fee obligation, which, as noted, is based on its total number of subscribers. We propose to initially rely on a cable operator's good faith representation on its fee remittance form as to the number of subscribers it has as of the date of its annual regulatory fee payment. We also intend to perform random audits to determine whether individual cable systems have based their fee payments on the correct number of subscribers. Commenters are invited to suggest other alternatives.

77. As indicated above, we propose to allow installment payments for these regulatory fees if a cable television system's annual fee exceeds $18,500.00 (i.e., systems with more than 50,000

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[55]The term "subscriber" is defined in section 76.5 of the Commission's Rules. 47 C.F.R. § 76.5.

subscribers). We propose that this amount be considered large in this context because it significantly exceeds the estimated average fee that will be paid by most cable systems. Specifically, according to our estimates, the average fee in this category will be approximately $1,914.00 in FY 1994.[56] However, a relatively few systems (the approximately 2 percent of all systems) will be subject to average fees over $18,500.00 and significantly above the $1,914.00 average. These systems will pay, on average, a fee of approximately $36,000. Thus, we believe that $18,500.00 is a reasonable cut-off. Therefore, pursuant to the statute, we propose to permit cable systems whose regulatory fee for FY 1994 exceeds $18,500.00 to pay in two equal installments on the dates later specified by the Commission, subject to additional administrative and interest charges. We invite comment on this proposal.

**4. Common Carrier Bureau**

78. Most common carrier regulatory fees are based on the size of a regulatee's communication operation as determined by number of stations, subscribers, access lines, or antennas. We intend to rely on the Bureau's licensing data bases to confirm the identity and fee amount for most radio common carriers to the extent possible. However, where the Commission does not have information on hand to verify a regulatory fee multiplier (e.g., number of subscribers), we intend to rely on the good faith representations made on a regulatee's fee remittance form. We also intend to perform random audits to determine whether individual regulatees have reported the correct multiplier. Additionally, we request comment with respect to how well the specific regulatory fee multipliers set forth in the statutory schedule are "reasonably related to the benefits provided" to regulatees.[57] Commenters should propose specific alternatives, which we may either recommend to Congress as technical amendments to the statutory schedule or incorporate into our own schedule of regulatory fees.

**a. Mobile Services**

79. Cellular and Public Mobile Licensees. Under Part 22 of our rules, common carriers are authorized to offer land-based or air-to-ground mobile telephone or paging services to the public. In addition to cellular telephone service, these services include those using radio to provide telephone services at fixed locations, such as Basic Exchange Telecommunications Radio Services, Rural Radio and Offshore Radio. For FY 1994, each common carrier licensee authorized under Part 22 will be assessed

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[56] See Appendix C, Table 2.

[57] See 47 U.S.C. § 159(b)(1)(A).

an annual regulatory fee of $60.00 per 1000 subscribers or any portion thereof.

80. Personal Communications Services. Licensed personal communications services ("PCS") will consist of a wide variety of commercial or private mobile communications services, including advanced paging, microcellular telephone communications, portable facsimile and other video and data transmission services. See generally, First Report and Order, Gen. Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162, (1993), on recon., FCC 94-30 (released March 4, 1994) (narrowband PCS); Second Report and Order, Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993) recon. pending (broadband PCS). The statutory Schedule of Regulatory Fees enacted in the 1993 Budget Act established an annual fee of $60.00 per 1000 subscribers for PCS licensees. At the same time, the 1993 Budget Act recognized that PCS licenses have not yet been issued. In particular, Congress directed the Commission to conclude its PCS rulemaking proceedings (Gen. Docket No. 90-314 and ET Docket No. 92-100) by February 6, 1994, and to commence the PCS licensing process by May 7, 1994.[11] In addition, our new PCS service rules provide licensees five years to meet minimum construction requirements. Accordingly, since it is unlikely that any PCS licensee will have a significant number of subscribers in the immediate future, we tentatively conclude that no regulatory fees will be collected from PCS licensees during the 1994 fiscal year. We intend to begin assessing and collecting regulatory fees for PCS in the 1995 fiscal year.

**b. Space Stations**

81. Space Stations in Geosynchronous Orbit. Domestic and international satellites, positioned in orbit to remain approximately fixed relative to the earth, are authorized to provide communications between satellites and earth stations on a common carrier and/or private carrier basis. For FY 1994, entities authorized to operate these space stations will be assessed an annual regulatory fee of $65,000.00 for each operational station in geosynchronous orbit during the fiscal year.

82. Space Stations in Low-Earth Orbit. Domestic and international non-geostationary satellites, positioned in a low-earth orbit ("LEO"), may be authorized to transmit to satellites and fixed or mobile earth stations. These services include the new non-voice, non-geostationary mobile-satellite service in bands below 1 GHz, see Report and Order, CC Docket No. 92-76, 8 FCC Rcd 8450 (1993), and mobile satellite systems in bands above 1 GHz, see Notice of Proposed Rulemaking, CC Docket No. 92-166,

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[11]Section 6002(d)(2), 1993 Budget Act.

FCC 94-11 (released February 18, 1994). Entities authorized to operate LEO systems will be assessed an annual regulatory fee of $90,000.00 for each such system. We note that the Commission's new rules for systems operating below 1 GHz do not define how many space stations in low-earth orbit would constitute a "system." See Report and Order, CC Docket No. 92-76, 8 FCC Rcd at 8451. Although no LEO systems are currently operational, for purposes of assessing regulatory fees, we propose to require a LEO operator to begin paying annual regulatory fees in the fiscal year in which they launch the first satellite in their system even though all the space stations specified in its application or instrument of authorization have not become operational. We request comment on this proposal. While it appears unlikely that a LEO system will be launched in the 1994 fiscal year,[9] should a LEO system be launched during that period, we tentatively propose to collect a regulatory fee for such launched systems and request comment on whether the entire annual fee amount should be required or if the fee should be assessed on a pro-rata basis.

**c. Public Fixed Radio Services**

83. Domestic Public Fixed Services. Licensees in the Domestic Public Fixed Services are authorized to use microwave frequencies for video and data distribution communications within the United States. These services, authorized under Part 21 of the Rules, include the Point-to-Point Microwave Radio Service, Local Television Transmission Radio Service, Multipoint Distribution Service (single-channel and multichannel) and Digital Electronic Message Service. For FY 1994, these licensees will be assessed an annual regulatory fee of $55.00 per call sign.

84. International Public Fixed Service. Licensees in the International Public Fixed Service are authorized as common carriers to provide radio communications between the United States and a foreign point via microwave, HF, troposcatter systems (other than satellites and satellite earth stations). This does not include service between the United States and Mexico and the United States and Canada using frequencies above 72 MHz. See 47 C.F.R. Part 23. For FY 1994, these licensees will be assessed an annual regulatory fee of $110.00 per call-sign.

**d. Earth Stations**

85. VSAT and Equivalent C-Band Antennas. Earth station systems comprising very small aperture terminals make up authorized networks operating in the 12 and 14 GHz bands and provide a variety of communications services to other stations in the

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[9] See Report and Order, at ¶ 18 (a permittee must begin construction of its first two satellites of its system within one year of grant of its construction permit).

network. Each system, authorized pursuant to blanket licensing procedures in Part 25 of the Rules, consists of a network of technically-identical small fixed-satellite earth stations which often includes a larger hub station. For FY 1994, entities holding VSAT authorizations will be assessed an annual regulatory fee of $6.00 per 100 antennas. Entities with less than 100 antennas will be subject to a minimum $6.00 fee.

86. Mobile Satellite Earth Stations. Under Part 25 of the Rules, mobile satellite service providers operate under blanket licenses for mobile antennas (transceivers), which are smaller than one meter and provide voice or data communications, including position location information, for mobile platforms such as cars, buses or trucks. For FY 1994, licensees will be assessed an annual regulatory fee of $6.00 per 100 antennas. Entities with less than 100 antennas will be subject to a minimum $6.00 fee.

87. Earth Station Antennas Less Than 9 Meters. Persons authorized or registered under Part 25 to operate fixed-satellite earth station antennas that are less than 9 meters in diameter are private and public carriers that provide telephone, television, data, and other forms of communications. This category includes antennas used to transmit and receive, transmit only, or receive only. Also included in this category are telemetry, tracking and control (TT&C) earth stations. For FY 1994, we will assess an annual regulatory fee of $6.00 per 100 antennas. Entities with less than 100 antennas will be subject to a minimum $6.00 fee.

88. Earth Station Antennas 9 Meters or Greater. This category covers fixed-satellite earth station antennas authorized under Part 25 that are equal to or greater than 9 meters in diameter. These earth stations are operated by private carriers and common carriers to provide telephone, television, data, and other forms of communications. Included in this category are telemetry, tracking, and control (TT&C) earth stations equal to or greater than 9 meters in diameter. For FY 1994, persons authorized to operate transmit/receive and transmit-only antennas will be assessed an annual regulatory fee of $85.00 per meter; receive-only antennas will be assessed a regulatory fee of $55.00 per meter.

**e. Interexchange and Local Exchange Carriers**

89. For FY 1994, interexchange carriers (long distance telephone companies) ("IXCs") will be assessed an annual regulatory fee of $60.00 per 1,000 presubscribed access lines. Similarly, local exchange carriers (local telephone operating companies) ("LECs") will be assessed an annual regulatory fee of $60.00 per 1,000 access lines. As noted above, for IXCs, we have identified regulatory fee payment amounts greater than $500,000.00 as large.

For LEC holding companies, we have identified $700,000.00 as a large amount. Thus, we propose to permit IXCs whose annual regulatory fee exceed $500,000.00 and LEC holding companies whose fee payments exceed $700,000 to make installment payments. A relatively small number of companies will incur annual fees in excess of these amounts compared with many other entities who are subject to much lower fees.[60] Specifically, we have estimated that the average fee for all interexchange carriers will be approximately $20,000. However, the top three carriers will be paying from $530,000 to $6 million dollars per year in regulatory fees. The estimated average fee for only the top 20 local exchange carriers is approximately $417,000. We have tentatively chosen as a logical cut-off point $700,000 because only a few carriers will pay this above-average fee and the vast majority of carriers will pay a fee that is significantly below the top 20 average fee. In fiscal year 1994, large fees may be paid in two installments. Given the higher annual operating revenues of these types of companies, we also believe that the proposed amounts for "large" fees are appropriate in this context.

**f. Competitive Access Providers**

90. Competitive access providers ("CAPs") are companies, other than the traditional local telephone companies, that provide interstate access services to long distance carriers and other companies. For FY 1994, each CAP will be assessed an annual regulatory fee of $60.00 per 1,000 subscribers.

**g. International Bearer Circuits**

91. This regulatory fee category covers active 64 kilobit (KB) circuits, or equivalent bearer circuits between the United States and other countries or overseas points including Canada and Mexico provided by private or common carrier submarine cable, satellite, terrestrial cable, microwave, over-the-horizon radio system, or any other transmission system, activated by international facilities-based common carriers for the provision of international telecommunications services. This category also includes 64 KB circuits, or equivalent bearer circuits, of owners of private submarine cable systems licensed by the Commission which have been placed in service for any use between the United States and other countries or overseas points. For FY 1994, we will assess an annual regulatory fee of $220.00 per 100 active 64 KB circuits or equivalent. We request comment on whether, based on our analysis of other "large" categories, these fees will be large. Since we do not anticipate that these fees will be large, we propose not to allow installment payments.

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[60] See Appendix C, Tables 3 and 4.

**G. Conforming and Clarifying Amendments to Application Fee Rules**

92. In addition to the new rules for regulatory fees, we are proposing to revise several sections of our rules governing the payment and collection of fees associated with applications and other filings. As noted above, these fees are assessed and collected pursuant to section 8 of the Communications Act and are separate and apart from the regulatory fees authorized under section 9. However, as noted above, where appropriate, our section 8 and section 9 fee collection procedures will be integrated. For the most part, the proposed modifications related to our filing fees are ministerial in nature to conform our application fee and regulatory fee regulations or will clarify existing fee payment requirements.

93. Fees for Resubmitted Applications. First, we propose to amend section 1.1107(d) of the rules, which governs fee payments relating to applications and other filings when resubmitted in the appropriate timeframe following a staff request for additional or corrected information. Ordinarily, no additional fee payment is required for resubmitted applications and other filings. However, the rules do require a supplemental fee payment whenever the revised information causes a change in the category of the filing with the result that a higher fee payment is now due under the fee schedule. Our rules provide that the additional fee payment, i.e., the difference between the fee initially submitted and the correct fee payment now due, must be submitted with the revised application or other filing.

94. In order to clarify our rule governing those procedures applicable when an additional fee is due, we propose to amend section 1.1107(d) to require persons submitting revised applications and other filings to submit any fee payment balance due when the revised application or other filing is submitted. Such applications and fees must be filed at the lockbox bank. In the event that the staff discovers, within 30 days after the resubmission, that the additional fee payment was not submitted, the application or other filing will be dismissed as deficient and the previously submitted section 8 fee payment will be retained under this proposal. A new fee payment (covering the entire amount) will be required with any future filing of the application or other filing. However, if the staff discovers the fee payment deficiency more than thirty days subsequent to the resubmission, the application or other filing will be retained but a 25 percent late fee will be assessed on the deficient amount even if the Commission has completed its action on the application or other filing involved.

95. Stale Checks. The Commission's correspondent bank for fee collections will not process a personal or business check dated

more than six months prior to its submission. Therefore, we propose to revise section 1.1108(a) of the rules to make clear that these "stale" checks will not be accepted as fee payments. Under this revision, and consistent with the Uniform Commercial Code, we will not accept any instrument of payment dated more than six months prior to the date of its filing with the lockbox bank, and we will return to the filer any application or other filing submitted with a stale payment instrument.

96. Receipts. Next, with regard to receipts requested for application fee payments, the Commission's practice is to furnish receipts only upon specific requests of the submitter rather than to provide receipts automatically for all fee payments received. We propose to clarify these procedures by amending section 1.1108 of the rules. In order to obtain a receipt for a fee payment, we propose to require that the application and fee package include a copy of the first page of the application or other filing, clearly marked "copy," submitted expressly for the purpose of serving as a receipt of the filing. The copy should be the top document in the fee payment package. The staff will date-stamp the copy immediately and provide it to the bearer of the submission, if hand delivered. For submissions by mail, the receipt copy will be provided through return mail if the filer has attached to the receipt copy a stamped self-addressed envelop of sufficient size to contain the date stamped copy of the application. We do not intend to provide receipts for regulatory fee payments.

97. Electronic Payment. In addition, pursuant to our proposal above regarding the submission of regulatory fee payments by electronic means, we propose to amend sections 1.1107 and 1.1108 of the rules to allow the payment of application and other filing fees by electronic means. Although such a system for electronic payment is not yet in place, we believe that it is appropriate in this proceeding, and in conjunction with the development of our pilot project, to propose changing these rules at this time and to seek comment on one particular aspect of this payment method as it specifically applies to applications and other filings. Specifically, we are concerned about matching electronically paid fees with submitted hard-copy applications.[61] If a party chooses to pay its application filing fee electronically, we believe that it should follow existing procedures for filing its application at the lockbox bank. However, in lieu of the current payment methods, the party will indicate on its remittance advice (FCC Form 159 or the underlying application form with fee information incorporated therein) that payment is being sent to the bank electronically. We tentatively conclude that in such situations the electronic payment must be made on or before the day the

[61]We note that some parts of the Commission are currently experimenting with electronic filing of applications.

application is filed. Upon receipt of an application, the bank will confirm that a fee payment has been received electronically. If the electronic payment is not received on the filing date, the application or request would be returned without processing. We believe these procedures are necessary to ensure the most efficient processing of electronic fee payments (when authorized) and applications or other filings. Finally, during the pilot phase of our electronic payment program, regulatees will be required to obtain our authorization before making electronic fee payments.

98. One-Check/One-Application Rule. We propose to modify our rules to allow the use of a single payment instrument or method to cover multiple applications for the same or different applicants, so long as all the applications are filed at the same time at the same lockbox. Any applicant desiring to pay for multiple regulatory/application filings in the same lockbox with a single payment instrument, or when paying by credit card, must also complete FCC Form 159, FCC Remittance Advice. Each item must be listed separately on the form with its own Payment Type Code. If another space is needed for multiple filings, the applicant must use FCC Form 159-S, FCC Supplemental Remittance Advice.[42]

99. Payment by Cashier's Check Required. Section 1.1108(d)(1)(i) of the Commission's Rules provides that payment of fees by cashier's check may be required when a person or organization has, on two or more occasions, made payment with a payment instrument on which the Commission does not receive final payment and such failure is not excused by bank error. 47 C.F.R. § 1.1108(d)(1)(i); see also id. § 1.1110(a). Under these circumstances, the Commission will send a letter detailing the terms and conditions of future payments, including a requirement that no form of payment, other than a cashier's check is acceptable. Despite this apparently strict response to "bounced" checks and other insufficient payment instruments, we continue to receive numerous checks that are not drawn on sufficient funds for payment. To ensure that payment instruments will result in a final payment being made to the Commission, we believe that our cashier's check safeguard should be strengthened. Accordingly, we propose that, when a person or organization has, on a single occasion, submitted a payment instrument on which final payment

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[42] All non-private radio section 9 regulatory fee payors must use FCC Form 159/159S when submitting single or multiple regulatory fees. Under current application fee rules, applicants are required to submit one check and one application. However, effective April 1, 1994, applicants will also be allowed to pay for multiple filings in the same lockbox with a single payment instrument. These applicants must also use FCC Form 159/159S for multiple filings.

is not received (and not excused by bank error), we will immediately notify the party that future fee payments must be made by cashier's check. If, subsequent to such notice, payment is not made by a cashier's check, that party's other payment instrument will not be accepted and its application or other filing will be returned.

100. Filing Locations For Petitions, Waivers and Deferrals. Finally, we will be making a few ministerial changes to the rules. Specifically, we will revise sections 1.1109(a)(3) and 1.1115 to clarify that any petition for reconsideration, application for review, and any petition for waiver or deferral of a fee payment, accompanied by an application or regulatory fee payment, must be submitted to the lockbox bank. If no fee payment is required and the matter is within the scope of the fee rules, the petition or application for review should be filed with the Secretary and clearly marked to the attention of the Managing Director. Petitions for deferral or waiver for which no fee payment is required should also be directed to the attention of the Managing Director.

## III. Procedural Matters

### A. Comment Period and Procedures

101. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before April 7, 1994, and reply comments on or before April 18, 1994. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

### B. Ex Parte Rules

102. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. See 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

**C. Initial Regulatory Flexibility Analysis**

103. As required by section 603 of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981)), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this Notice, but they must have a separate and distinct heading, designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

**D. Authority and Further Information**

104. Authority for this proceeding is contained in sections 4(i) and (j), 8, 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 158, 159, and 303(r).

105. Further information about this proceeding may be obtained by contacting H. Walker Feaster, Associate Managing Director -- Program Analysis, at 202-632-0923.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDICES

## APPENDIX A

### STATUTORY SCHEDULE OF REGULATORY FEES

| Bureau/Category | Annual Regulatory Fee |
|---|---|
| Private Radio Bureau | |
| Exclusive use services (per license) | |
| Land Mobile (above 470 MHz, Base Station and SMRS) (47 C.F.R. Part 90) | $16 |
| Microwave (47 C.F.R. Part 94) | 16 |
| Interactive Video Data Service (47 C.F.R. Part 16) | 16 |
| Shared use services (per license unless otherwise noted) | 7 |
| Amateur vanity call-signs | 7 |
| Mass Media Bureau (per license) | |
| AM radio (47 C.F.R. Part 73) | |
| Class D Daytime | 250 |
| Class A Fulltime | 900 |
| Class B Fulltime | 500 |
| Class C Fulltime | 200 |
| Construction permits | 100 |
| FM radio (47 C.F.R. Part 73) | |
| Classes C, C1, C2, B | 900 |
| Classes A, B1, C3 | 600 |
| Construction permits | 500 |
| TV (47 C.F.R. Part 73) | |
| VHF Commercial | |
| Markets 1 thru 10 | 18,000 |
| Markets 11 thru 25 | 16,000 |
| Markets 26 thru 50 | 12,000 |
| Markets 51 thru 100 | 8,000 |
| Remaining Markets | 5,000 |
| Construction permits | 4,000 |
| UHF Commercial | |
| Markets 1 thru 10 | 14,400 |
| Markets 11 thru 25 | 12,800 |
| Markets 26 thru 50 | 9,600 |
| Markets 51 thru 100 | 6,400 |
| Remaining Markets | 4,000 |
| Construction permits | 3,200 |
| Low Power TV, TV Translator, and TV Booster (47 C.F.R. Part 74) | 135 |
| Broadcast Auxiliary (47 C.F.R. Part 74) | 25 |
| International (HF) Broadcast (47 C.F.R. Part 73) | 200 |
| Cable Antenna Relay Service (47 C.F.R. Part 78) | 220 |
| Cable Television System (per 1,000 subscribers) (47 C.F.R. Part 76) | 370 |

| | |
|---|---|
| Common Carrier Bureau | |
| Radio Facilities | |
| Cellular Radio (per 1,000 subscribers) (47 C.F.R. Part 22) | 60 |
| Personal Communications (per 1,000 subscribers) (47 C.F.R.) | 60 |
| Space Station (per operational station in geosynchronous orbit) (47 C.F.R. Part 25) | 65,000 |
| Space Station (per system in low-earth orbit) (47 C.F.R. Part 25) | 90,000 |
| Public Mobile (per 1,000 subscribers) (47 C.F.R. Part 22) | 60 |
| Domestic Public Fixed (per call sign) (47 C.F.R. Part 21) | 55 |
| International Public Fixed (per call sign) (47 C.F.R. Part 23) | 110 |
| Earth Stations (47 C.F.R. Part 25) | |
| VSAT and equivalent C-Band antennas (per 100 antennas) | 6 |
| Mobile satellite earth stations (per 100 antennas) | 6 |
| Earth station antennas | |
| Less than 9 meters (per 100 antennas) | 6 |
| 9 Meters or more | |
| Transmit/Receive and Transmit Only (per meter) | 85 |
| Receive only (per meter) | 55 |
| Carriers | |
| Inter-Exchange Carrier (per 1,000 presubscribed access lines) | 60 |
| Local Exchange Carrier (per 1,000 access lines) | 60 |
| Competitive access provider (per 1,000 subscribers) | 60 |
| International circuits (per 100 active 64KB circuit or equivalent) | 220 |

## APPENDIX B

**Initial Regulatory Flexibility Analysis**

Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding the Commission's proposed implementation of newly enacted Section 9 of the Communications Act in which Congress directed the Commission to establish rules for the collection of regulatory fees.

Objectives

The Commission seeks to implement the collection of regulatory fees, as contained in Schedule of Regulatory Fees, in the most efficient manner possible and without undue burden to the public.

Legal Basis

The proposed action is authorized under sections (4)(i) and (j), 8, 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 158, 159, and 303(r).

Reporting, Recordkeeping and other Compliance Requirements.

The Commission is developing an FCC Remittance Advice Form (FCC Form 159) for submission to the Commission with single regulatory fee payments and an FCC Supplemental Remittance Advice Form (FCC Form 159S) for submission with multiple regulatory fee payments.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule.

None.

Description, Potential Impact, and Number of Small Entities Involved.

The proposed implementation of the collection of regulatory fees will affect permittees, licensees and other regulatees in the cable, common carrier, mass media and private radio services. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

The Notice solicits comments on a variety of alternatives.

## APPENDIX C

VHF Commercial (Top 100 Markets)

| | Annual Fee | Payors | % | Total Fee | % | Top 25/Bottom 50 Payors | % | Total Fee | % | Ave. Fee |
|---|---|---|---|---|---|---|---|---|---|---|
| Markets 1 thru 10 | $18,000 | 44 | 14.29% | $792,000 | 21.71% | | | | | |
| Markets 11 thru 25 | $16,000 | 58 | 18.83% | $928,000 | 25.44% | 102 | 33.12% | $1,720,000 | 47.15% | $16,863 |
| Markets 26 thru 50 | $12,000 | 70 | 22.73% | $840,000 | 23.03% | | | | | |
| Markets 51 thru 100 | $8,000 | 136 | 44.16% | $1,088,000 | 29.82% | 206 | 66.88% | $1,928,000 | 52.85% | $9,359 |
| | TOTALS | 308 | 100.00% | $3,648,000 | 100.00% | 308 | 100% | $3,648,000 | 100% | $11,844 |

UHF Commercial (Top 100 Markets)

| | Annual Fee | Payors | % | Total Fee | % | Top 25/Bottom 50 Payors | % | Total Fee | % | Ave. Fee |
|---|---|---|---|---|---|---|---|---|---|---|
| Markets 1 thru 10 | $14,400 | 82 | 20.45% | $1,180,800 | 29.43% | | | | | |
| Markets 11 thru 25 | $12,800 | 73 | 18.20% | $934,400 | 23.29% | 155 | 38.65% | $2,115,200 | 52.71% | $13,646 |
| Markets 26 thru 50 | $9,600 | 101 | 25.19% | $969,600 | 24.16% | | | | | |
| Markets 51 thru 100 | $6,400 | 145 | 36.16% | $928,000 | 23.13% | 246 | 61.35% | $1,897,600 | 47.29% | $7,714 |
| | TOTALS | 401 | 100.00% | $4,012,800 | 100.00% | 401 | 100% | $4,012,800 | 100% | $10,007 |

VHF Commercial

| | Annual Fee | Payors | % | Total Fee | % | Top 25 vs. The Rest Payors | % | Total Fee | % | Ave. Fee |
|---|---|---|---|---|---|---|---|---|---|---|
| Markets 1 thru 10 | $18,000 | 44 | 7.99% | $792,000 | 16.29% | | | | | |
| Markets 11 thru 25 | $16,000 | 58 | 10.53% | $928,000 | 19.08% | 102 | 18.51% | $1,720,000 | 35.37% | $16,863 |
| Markets 26 thru 50 | $12,000 | 70 | 12.70% | $840,000 | 17.27% | | | | | |
| Markets 51 thru 100 | $8,000 | 136 | 24.68% | $1,088,000 | 22.37% | | | | | |
| Remaining Markets | $5,000 | 243 | 44.10% | $1,215,000 | 24.98% | 449 | 81.49% | $3,143,000 | 64.63% | $7,000 |
| | TOTALS | 551 | 100.00% | $4,863,000 | 100.00% | 551 | 100% | $4,863,000 | 100% | $8,826 |

UHF Commercial

| | Annual Fee | Payors | % | Total Fee | % | Top 25 vs. The Rest Payors | % | Total Fee | % | Ave. Fee |
|---|---|---|---|---|---|---|---|---|---|---|
| Markets 1 thru 10 | $14,400 | 82 | 14.62% | $1,180,800 | 25.38% | | | | | |
| Markets 11 thru 25 | $12,800 | 73 | 13.01% | $934,400 | 20.08% | 155 | 27.63% | $2,115,200 | 45.46% | $13,646 |
| Markets 26 thru 50 | $9,600 | 101 | 18.00% | $969,600 | 20.84% | | | | | |
| Markets 51 thru 100 | $6,400 | 145 | 25.85% | $928,000 | 19.94% | | | | | |
| Remaining Markets | $4,000 | 160 | 28.52% | $640,000 | 13.76% | 406 | 72.37% | $2,537,600 | 54.54% | $6,250 |
| | TOTALS | 561 | 100.00% | $4,652,800 | 100.00% | 561 | 100% | $4,652,800 | 100% | $8,294 |

Note: Number of Payors equals number of commercial stations in Arbitron ADI according to TV and Cable Fact Book (Warren Publishing 1993 Edition) at A-1.

**TABLE 1 -- Estimated Television Regulatory Fees**

U.S. Cable Systems by Subscriber Size
(As of November 1, 1992)

Annual Fee = $370 per 1,000 subscribers

| Size by Subscribers | Systems | % | Total Subs. | % | Ave. Subs | Total Fees | % | Ave. Fee/System |
|---|---|---|---|---|---|---|---|---|
| 50,000 and over | 221 | 1.994% | 21,538,463 | 40.353% | 97,459 | $7,969,231 | 37.577% | $36,060 |
| 20,000 - 49,999 | 417 | 3.763% | 12,834,441 | 24.046% | 30,778 | $4,748,743 | 22.391% | $11,388 |
| 10,000 - 19,999 | 507 | 4.575% | 7,204,259 | 13.497% | 14,210 | $2,665,576 | 12.569% | $5,258 |
| 5,000 - 9,999 | 642 | 5.793% | 4,544,524 | 8.514% | 7,079 | $1,681,474 | 7.929% | $2,619 |
| 3,500 - 4,999 | 406 | 3.663% | 1,703,013 | 3.191% | 4,195 | $630,115 | 2.971% | $1,552 |
| 1,000 - 3,499 | 1,896 | 17.107% | 3,616,097 | 6.775% | 1,907 | $1,337,956 | 6.309% | $706 |
| 500 - 999 | 1,421 | 12.821% | 1,017,620 | 1.907% | 716 | $525,770 | 2.479% | $370 |
| 250 - 499 | 1,500 | 13.534% | 536,734 | 1.006% | 358 | $555,000 | 2.617% | $370 |
| 249 and under | 2,957 | 26.681% | 380,323 | 0.713% | 129 | $1,094,090 | 5.159% | $370 |
| Not Available | 1,116 | 10.069% | n/a | n/a | n/a | n/a | n/a | n/a |
| TOTALS | 11,083 | 100.000% | 53,375,474 | 100.000% | 4,816 | $21,207,955 | 100.000% | $1,914 |

| Size by Subscribers | Systems | % | Total Subs. | % | Ave. Subs | Total Fees | % | Ave. Fee/System |
|---|---|---|---|---|---|---|---|---|
| Under 50,000 | 10,862 | 98.006% | 31,837,011 | 59.647% | 2,931 | $11,779,694 | 55.544% | $1,084 |
| 20,000 and over | 638 | 5.757% | 34,372,904 | 64.398% | 53,876 | $12,717,974 | 59.968% | $19,934 |
| 1,000 - 19,999 | 3,451 | 31.138% | 17,067,893 | 31.977% | 4,946 | $6,315,120 | 29.777% | $1,830 |
| Under 1000 | 5,878 | 53.036% | 1,934,677 | 3.625% | 329 | $2,174,860 | 10.255% | $370 |

Source: TV & Cable Fact Book (Cable Volume) (Warren Publishing 1993 Edition) at F-3.

TABLE 2 -- Estimated Cable Television Regulatory Fees

Inter-Exchange Carriers Presubscribed Lines
(As of December 1992)

| Carrier | Thousands of Lines | Fee per 1000 lines | Total Fee | % |
|---|---|---|---|---|
| AT&T | 101,204 | $60 | $6,072,240 | 72.95% |
| MCI | 20,167 | $60 | $1,210,020 | 14.54% |
| Sprint | 8,856 | $60 | $531,360 | 6.33% |
| Others | 8,496 | $60 | $509,760 | 6.12% |
| Totals | 138,723 | | $8,323,380 | 100.00% |

Other Inter-exchange Carriers

| Number | Total Lines (1000's) | Average Lines (1000's) | Fee per 1000 Lines | Average Fee |
|---|---|---|---|---|
| 411 | 8,496 | 20.67 | $60 | $1,240 |

Average Fee for 414 Carriers: $20.105

Source: Long Distance Market Shares, Second Quarter, 1993, Table 4 (Industry Anal. Div. Sept. 1993).

**TABLE 3 -- Estimated Inter-Exchange Carrier Regulatory Fees**

Top 20 Local Exchange Carriers by Access Lines
Annual Fee = $60.00 per 1,000 access lines
(As of December 31, 1992)

| Telephone Company | Access Lines | Annual Fee | % of Top 20 |
|---|---|---|---|
| Bell Atlantic Corp. | 18,181,000 | $1,090,860 | 13.08% |
| Bell South Corp. | 18,109,834 | $1,086,590 | 13.03% |
| Ameritech Corp. | 17,001,000 | $1,020,060 | 12.24% |
| GTE Corp. | 16,191,000 | $971,460 | 11.65% |
| NYNEX | 15,699,088 | $941,945 | 11.30% |
| Pacific Telesis Group | 14,551,000 | $873,060 | 10.47% |
| US West Communications | 13,344,975 | $800,699 | 9.60% |
| Southwestern Bell Corp. | 12,603,033 | $756,182 | 9.07% |
| Sprint Corp. | 4,241,443 | $254,487 | 3.05% |
| Southern New England Telephone | 1,902,100 | $114,126 | 1.37% |
| Centel Corp. | 1,606,409 | $96,385 | 1.16% |
| ALLTEL Corp. | 1,301,981 | $78,119 | 0.94% |
| Puerto Rico Telephone Corp. | 963,932 | $57,836 | 0.69% |
| Rochester Telephone Corp. | 895,971 | $53,758 | 0.64% |
| Cincinnati Bell Telephone Co. | 815,286 | $48,917 | 0.59% |
| Century Telephone Enterprises, | 397,300 | $23,838 | 0.29% |
| PTI Communications, Inc. | 379,359 | $22,762 | 0.27% |
| Telephone & Data Systems, Inc. | 321,700 | $19,302 | 0.23% |
| Lincoln Telephone & Telegraph | 243,039 | $14,582 | 0.17% |
| C-TEC Corp. | 203,844 | $12,231 | 0.15% |
| Totals for Top 20 | 138,953,294 | $8,337,198 | 100.00% |
| Average Fee for Top 20 | | $416,860 | |
| LECs with Fees over $500,000 | 125,680,930 | $7,540,856 | 90.45% |

Source: Holding Company Report (U.S. Telephone Assoc. 1993)

**TABLE 4 -- Estimated Local Exchange Carrier Regulatory Fees**

FCC 94-141

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of the Schedule | ) | |
| of Application Fees Set | ) | GEN Docket No. 86-285 |
| Forth in Sections 1.1102 | ) | |
| through 1.1105 of the | ) | |
| Commission's Rules. | ) | |
| | ) | |

**ORDER**

**Adopted: June 6, 1994; Released:** June 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. By this action, the Commission amends its Schedule of Application Fees, 47 C.F.R. § 1.1102 et seq., to adjust the fees for processing applications and other filings. Section 8(b) of the Communications Act requires that the Commission adjust its application fees every two years after October 1, 1991. 47 U.S.C. § 158(b). The increased fees reflect the net change in the Consumer Price Index for all Urban Consumers (CPI-U) of 14.8 percent, calculated from December 1989 through August 1993. The adjustments to the fee schedule comport with the statutory formula set forth in section 8(b). Consistent with section 8(b), the Commission transmitted to Congress notification of the fee adjustments on December 23, 1993. Congress has interposed no objection to the proposed increases in the fees.

2. Accordingly, IT IS ORDERED, That the Schedule of Application Fees, 47 C.F.R. § 1.1102 et seq., IS AMENDED as set forth below, effective thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## RULE CHANGES

47 CFR Part 1 is amended as follows:

Part 1 - Practice and Procedure

1. The authority citation for part 1 continues to read as follows:

**Authority: 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.**

2. Section 1.1102 is revised to read as follows:

**§1.1102 Schedule of charges for applications and other filings in the private radio services.**

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 1. Land Transportation | | | | |
| a. New, Renewal, Reinstatement | 574 | 80 | PALR | Federal Communications Commission, Land Transportation P.O. Box 358215 Pittsburgh, PA 15251-5215 |
| b. Modification, Assignment, Nonprofit | 574 | 45 | PALM | Federal Communications Commission, Land Transportation P.O. Box 358730 Pittsburgh, PA 15251-5730 |
| 2. Business | | | | |
| a. New, Renewal, Reinstatement | 574 | 80 | PALR | Federal Communications Commission, Business P.O. Box 358220 Pittsburgh, PA 15251-5220 |
| b. Modification, Assignment, Non-profit | 574 | 45 | PALM | Federal Communications Commission, Business P.O. Box 358735 Pittsburgh, PA 15251-5735 |
| 3. Other Industrial | | | | |
| a. New, Renewal, Reinstatement | 574 | 80 | PALR | Federal Communications Commission, Other Industrial P.O. Box 358225 Pittsburgh, PA 15251-5225 |
| b. Modification, Assignment, Non-profit | 574 | 45 | PALM | Federal Communications Commission, Other Industrial P.O. Box 358740 Pittsburgh, PA 15251-5740 |
| 4. GMRS | | | | |
| a. New, Renewal, Reinstatement | 574 | 80 | PALR | Federal Communications Commission, GMRS P.O. Box 358230 Pittsburgh, PA 15251-5230 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| b. Modification | 574 | 45 | PALM | Federal Communications Commission, GMRS P.O. Box 358745 Pittsburgh, PA 15251-5745 |
| 5. 800 MHz | | | | |
| a. New, Renewal, Reinstatement | 574 | 125 | PALS | Federal Communications Commission, 800 MHz P.O. Box 358235 Pittsburgh, PA 15251-5235 |
| b. Modification, Assignment, non-profit | 574 | 45 | PALM | Federal Communications Commission, 800 MHz, P.O. Box 358750 Pittsburgh, PA 15251-5750 |
| 6. 900 MHz | | | | |
| a. New, Renewal, Reinstatement | 574 | 125 | PALS | Federal Communications Commission, 900 MHz, P.O.Box 358240 Pittsburgh, PA 15251-5240 |
| b. Modification, Assignment, Non-profit | 574 | 45 | PALM | Federal Communications Commission, 900 MHZ, P.O. Box 358755 Pittsburgh, PA 15251-5755 |
| 7. BUS,OI,LT,GMRS,PS/SE, 470-512, 800,900,220,220 NAT (Renewal) Renewal (Non-Profit) | 574R or 405A | 45 | PALM | Federal Communications Commission, BUS, OI, LT, GMRS, P.O. Box 358245 Pittsburgh, PA 15251-5245 |
| 8. IVDS (Renewal) Renewal (Non-Profit) | 574 or 405A | 45 | PAIM | Federal Communications Commission, IVDS, P.O. Box 358245 Pittsburgh, PA 15251-5245 |
| 9. BUS,OI,LT,GMRS, (Renewal) Renewal | 574 or 405A | 80 | PALR | Federal Communications Commission, BUS,OI,LT,GMRS P.O. Box 358245 Pittsburgh, PA 15251-5245 |
| 10. 470-512,800,900,220 (Renewal) Renewal | 574 or 405A | 125 | PALS | Federal Communications Commission, 470-512,800,900,220 P.O. Box 358245 Pittsburgh, PA 15251-5245 |
| 11. 220 Nationwide (Renewal) Renewal | 574R or 405A | 205 | PALT | Federal Communications Commission, 220 Nationwide (Renewal) P.O. Box 358245 Pittsburgh, PA 15251-5245 |
| 12. IVDS (Renewal) Renewal | 574R or 405A | 125 | PAIR | Federal Communications Commission, IVDS P.O. Box 358245 Pittsburgh, PA 15251-5245 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 13. Microwave | | | | |
| a. New, Renewal | 402 | 260 | PEOR | Federal Communications Commission, Microwave P.O. Box 358250 Pittsburgh, PA 15251-5250 |
| b. Modification, Assignment, Non-profit | 402 | 180 | PEOM | Federal Communications Commission, Micorowave P.O. Box 358760 Pittsburgh, PA 15251-5760 |
| 14. Microwave (Renewal) | | | | |
| a. Renewal | 402R | 260 | PEOR | Federal Communications Commission,Microwave (Renewal) P.O. Box 358255 Pittsburgh, PA 15251-5255 |
| b. Renewal (Non-profit) | 402R | 180 | PEOM | Federal Communications Commission, Microwave (Renewal P.O. Box 358255 Pittsburgh, PA 15251-5255 |
| 15. Ground | | | | |
| a. New, Renewal, Reinstatement | 406 | 120 | PBVR | Federal Communications Commission, Ground P.O. Box 358260 Pittsburgh, PA 15251-5260 |
| b. Modification, Assignment Non-Profit | 406 | 85 | PBVM | Federal Communications Commission, Ground, P.O. Box 358765 Pittsburgh, PA 15251-5765 |
| c. Ground (Renewal) Non-Profit | 452R | 85 | PBVM | Federal Communications Commission, Ground, P.O. Box 358270 Pittsburgh, PA 15251-5270 |
| d. Ground (Renewal) Renewal | 452R | 120 | PBVR | Federal Communications Commission, Ground, P.O. Box 358270 Pittsburgh, PA 15251-5270 |
| 16. Coast | | | | |
| a. New, Renewal, Reinstatement | 503 | 120 | PBMR | Federal Communications Commission, Coast, P.O. Box 358265, Pittsburgh, PA 15251-5265 |
| b. Modification, Assignment | 503 | 85 | PBMM | Federal Communications Commission, Coast, P.O. Box 358770, Pittsburgh, PA 15251-5770 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| c. Renewal (Non-Profit) | 452R | 85 | PBMM | Federal Communications Commission, Coast (Renewal), P.O. Box 358270, Pittsburgh, PA 15251-5270 |
| d. Renewal | 452R | 120 | PBMR | Federal Communications Commission, Coast (Renewal), P.O. Box 358270, Pittsburgh, PA 15251-5270 |
| 17. Ship | | | | |
| a. New, Renewal | 506 | 115 | PASR | Federal Communications Commission, Ship, P.O. Box 358275, Pittsburgh, PA 15251-5275 |
| b. Modification, Non-Profit | 506 | 45 | PASM | Federal Communications Commission, Ship, P.O. Box 358775, Pittsburgh, PA 15251-5775 |
| c. Ship (Renewal) Non-Profit | 405B | 45 | PASM | Federal Communications Commission, Ship, P.O. Box 358290, Pittsburgh, PA 15251-5290 |
| d. Ship (Renewal) | 405B | 115 | PASR | Federal Communications Commission, Ship, P.O. Box 358290, Pittsburgh, PA 15251-5290 |
| 18. Aircraft | | | | |
| a. New, Renewal | 404 | 115 | PAAR | Federal Communications Commission, Aircraft, P.O. Box 358280, Pittsburgh, PA 15251-5280 |
| b. Modification, Non-Profit | 404 | 45 | PAAM | Federal Communications Commission, Aircraft, P.O. Box 358780, Pittsburgh, PA 15251-5780 |
| c. Aircraft (Renewal) Non-Profit | 405B | 45 | PAAM | Federal Communications Commission, Aircraft (Renewal), P.O. Box 358290, Pittsburgh, PA 15251-5290 |
| d. Aircraft (Renewal) | 405B | 115 | PAAR | Federal Communications Commission, Aircraft (Renewal), P.O. Box 358290, Pittsburgh, PA 15251-5290 |
| 19. Public Safety & Special Emergency | 574 | 45 | PALM | Federal Communications Commission, Public Safety, P.O. Box 358285, Pittsburgh, PA 15251-5285 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 20. Restricted Permit | 753 | 150 | PARR | Federal Communications Commission, RP, P.O. Box 358295, Pittsburgh, PA 15251-5295 |
| 21. Waiver | Corr & 159 | 125 | PDWM | Federal Communications Commission, Waiver, P.O. Box 358300, Pittsburgh, PA 15251-5300 |
| 22. Correspondence (Finders Preference) | Corr & 159 | 125 | PDXM | Federal Communications Commission, FP, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 23. STA (Common Carrier) | Corr & 159 | 85 | CEP | Federal Communications Commission, STA, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 24. STA (Common Carrier) | Corr & 159 | 85 | CEL | Federal Communications Commission, STA, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 25. STA (BAPS) | Corr & 159 | 115 | MGA | Federal Communications Commission, STA, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 26. STA (IVDS) | Corr & 159 | 45 | PAIM | Federal Communications Commission, STA, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 27. STA (Coast) | Corr & 159 | 115 | PCMM | Federal Communications Commission, STA, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 28. STA (Ground) | Corr & 159 | 115 | PCVM | Federal Communications Commission, STA, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 29. STA (Microwave) | Corr & 159 | 45 | PAOM | Federal Communications Commission, STA, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 30. STA (LM, GMRS) | Corr & 159 | 45 | PALM | Federal Communications Commission, STA, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 31. Corres (Duplicate) | Corr & 159 753, 755, 756 | 45 | PADM | Federal Communications Commission, Duplicate, P.O. Box 358305, Pittsburgh, PA 15251-5305 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 32. Corres (Hearing) | Corr & 159 | 7,765 | PFHM | Federal Communications Commission, Hearing, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 33. Corres (Wait List) | Corr & 159 | 45 | PAWM | Federal Communications Commission, Wait List, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 34. Corres (Blanket Renewal) (Land Mobile, Non-Profit) | Corr & 159 | 45 | PALM | Federal Communications Commission, Blanket Renewal, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 35. Corres (Blanket Renewal) (IVDS, Non-Profit) | Corr & 159 | 45 | PAIM | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 36. Corres (Blanket Renewal) Microwave, Non-Profit | Corr & 159 | 180 | PEOM | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 37. Corres (Blanket Renewal) Ground, Non-Profit | Corr & 159 | 85 | PBVM | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 38. Corres (Blanket Renewal) Coast, Non-Profit | Corr & 159 | 85 | PBMM | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 39. Corres (Blanket Renewal) Aircraft, Non-Profit | Corr & 159 | 45 | PAAM | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 40. Corres (Blanket Renewal) Ship, Non-Profit | Corr & 159 | 45 | PASM | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 41. Corres (Blanket Renewal) BUS, OI, LT, GMRS | Corr & 159 | 80 | PALR | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 42. Corres (Blanket Renewal) 470-512, 800, 900, 220 | Corr & 159 | 125 | PALS | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 43. Corres (Blanket Renewal) 220 Nationwide | Corr & 159 | 205 | PALT | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 44. Corres (Blanket Renewal) IVDS | Corr & 159 | 125 | PAIR | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 45. Corres (Blanket Renewal) Microwave | Corr & 159 | 260 | PEOR | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 46. Corres (Blanket Renewal) Ground | Corr & 159 | 120 | PBVR | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 47. Corres (Blanket Renewal) Coast | Corr & 159 | 120 | PBMR | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 48. Corres (Blanket Renewal) Aircraft | Corr & 159 | 115 | PAAR | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 49. Corres (Blanket Renewal) Ship | Corr & 159 | 115 | PASR | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 50. Corres (Blanket Renewal) Common Carrier | Corr & 159 | 180 | CJP | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 51. Corres (Blanket Renewal) Common Carrier | Corr & 159 | 180 | CJL | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 52. Corres (Blanket Renewal) (BAPS) | Corr & 159 | 45 | MAA | Federal Communications Commission, Blanket, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 53. Transfer of Control | 703 | 45 | PATM | Federal Communications Commission, Transfer, P.O. Box 358310, Pittsburgh, PA 15251-5310 |
| 54. Billing | Invoice | Various | Various | Federal Communications Commission, Billings, P.O. Box 358325, Pittsburgh, PA 15251-5325 |
| 55. 220 MHz<br>a. New, Renewal, Reinstatement | 574 | 125 | PALS | Federal Communications Commission, 220 MHz, P.O. Box 358360, Pittsburgh, PA 15251-5360 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| b. Modification, Assignment Non-Profit | 574 | 45 | PALM | Federal Communications Commission, 220 MHz, P.O. Box 358790, Pittsburgh, PA 15251-5790 |
| 56. IVDS | | | | |
| a. New, Renewal, Reinstatement | 574 | 125 | PAIR | Federal Communications Commission, IVDS, P.O. Box 358365, Pittsburgh, PA 15251-5365 |
| b. Modification Non-Profit | 574 | 45 | PAIM | Federal Communications Commission, IVDS, P.O. Box 358795, Pittsburgh, PA 15251-5795 |
| 57. Common Carrier | | | | |
| a. New, Modification | 494 | 180 | CJP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| b. Construction | 494A | 180 | CJP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| c. Renewal | 405 | 180 | CJP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| d. Ext. Construct. | 701 | 65 | CCP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| e. Assignment | 702 | 65 | CCP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| f. Transfer of Control | 704 | 65 | CCP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| g. Additional Stations | 702 | 45 | CAP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| h. Additional Stations | 704 | 45 | CAP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| i. Waiver | Corr & 159 | 85 | CEP | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| j. New, Modification | 494 | 180 | CJL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| k. Construction | 494A | 180 | CJL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| l. Renewal | 405 | 180 | CJL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| m. Ext. Construction | 701 | 65 | CCL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| n. Assignment | 702 | 65 | CCL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| o. Transfer of Control | 704 | 65 | CCL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| p. Additional Stations | 702 | 45 | CAL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| q. Additional Stations | 704 | 45 | CAL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| r. Construction Waiver | Corr & 159 | 85 | CEL | Federal Communications Commission, CCB, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| 58. Mass Media (BAPS) a. New, Modification | 313 | 100 | MEA | Federal Communications Commission, MMB, P.O. Box 358700, Pittsburgh, PA 15251-5700 |
| b. Renewal | 313R | 45 | MAA | Federal Communications Commission, MMB, P.O. Box 358700, Pittsburgh, PA 15251-5700 |
| 59. Commercial a. New | 756 | 105 | PACQ | Federal Communications Commission, FOB, P.O. Box 358725, Pittsburgh, PA 15251-5725 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| b. New | 756 | 35 | PACR | Federal Communications Commission, FOB, P.O Box 358800, Pittsburgh, PA 15251-5800 |
| c. Renewal | 756 | 80 | PACS | Federal Communications Commission, FOB, P.O. Box 358805, Pittsburgh, PA 15251-5805 |
| 60. 470-512 | | | | |
| a. New, Renewal, Reinstatement | 574 | 125 | PALS | Federal Communications Commission, 470-512, P.O. Box 358810, Pittsburgh, PA 15251-5810 |
| b. Modification, Assignment, Non-Profit | 574 | 45 | PALM | Federal Communications Commission, 470-512, P.O. Box 358815, Pittsburgh, PA 15251-5815 |
| 61. 220 Nationwide | | | | |
| a. New, Renewal, Reinstatement | 574 | 205 | PALT | Federal Communications Commission, 220 Nationwide, P.O. Box 358820, Pittsburgh, PA 15251-5820 |
| b. Modification, Assignment, Non-Profit | 574 | 45 | PALM | Federal Communications Commission, 220 Nationwide, P.O. Box 358825, Pittsburgh, PA 15251-5825 |
| 62. Amateur C/S | — | 70 | PBAR | Federal Communications Commission, Amateur, P.O. Box 358830, Pittsburgh, PA 15251-5830 |
| 63. Electronic Filing | | | | |
| a. New, Renewal, Reinstatement | ELT | 80 | PALR | Federal Communications Commission, ELT, P.O. Box 358994, Pittsburgh, PA 15251-5994 |
| b. Modification, Assignment, Non-Profit | ELT | 45 | PALM | Federal Communications Commission, ELT, P.O. Box 358994, Pittsburgh, PA 15251-5994 |
| c. New, Renewal, Reinstatement | ELT | 1125 | PALS | Federal Communications Commission, ELT, P.O. Box 358994, Pittsburgh, PA 15251-5994 |
| d. New, Renewal, Reinstatement | ELT | 205 | PALT | Federal Communications Commission, ELT, P.O. Box 358994, Pittsburgh, PA 15251-5994 |
| e. New, Renewal, Reinstatement | ELT | 125 | PAIR | Federal Communications Commission, ELT, P.O. Box 358994, Pittsburgh, PA 15251-5994 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| f. Modification, Non-Profit | ELT | 45 | PAIM | Federal Communications Commission, ELT, P.O. Box 358994, Pittsburgh, PA 15251-5994 |

3. Section 1.1103 is revised to read as follows:

**§1.1103 Schedule of charges for equipment authorization, experimental radio services, ship inspections and international telecommunications settlements.**

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 1. Certification: | | | | |
| a. Receivers (except TV and FM receivers) | 731 | 330 | EEC | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| b. All Other Devices | 731 | 845 | EGC | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| c. Modifications and Class II Permissive Changes | 731 | 45 | EAC | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| d. Request for Confidentiality | 731 or Corr & 159 | 125 | EBC | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| 2. Type Acceptance | | | | |
| a. All Devices | 731 | 425 | EFT | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| b. Modifications and Class II Permissive Changes | 731 | 45 | EAT | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| c. Request for Confidentiality | 731 or Corr & 159 | 125 | EBT | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| 3. Type Approval (There are no longer any radio frequency devices subject to Type Approval) | | | | |
| 4. Notifications (All Devices) | 731 | 135 | ECN | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| Advance Approval for Subscription TV System | Corr & 159 | 2,590 | EIS | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| a. Request for Confidentiality | Corr & 159 | 125 | EBS | Federal Communications Commission, Equipment Approval Services, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| Assignment of Applicant Code<br>a. New applicants for all application types except Subscription TV | Corr & 159 | 45 | EAG | Federal Communications Commission, Experimental Radio Service, P.O. Box 358315, Pittsburgh, PA 15251-5315 |
| Experimental Radio Service<br>a. New Construction Permit and Station Authorization (per application) | 442 | 45 | EAE | Federal Communications Commission, Experimental Radio Service, P.O. Box 358320, Pittsburgh, PA 15251-5320 |
| b. Modification to Existing Construction Permit and Station Authority (per application) | 442 | 45 | EAE | Federal Communications Commission, Experimental Radio Service, P.O. Box 358320, Pittsburgh, PA 15251-5320 |
| c. Renewal of Station Authorization (per application) | 405 | 45 | EAE | Federal Communications Commission, Experimental Radio Service, P.O. Box 358320, Pittsburgh, PA 15251-5320 |
| d. Assignment or Transfer of Control (per application) | 702 or 703 | 45 | EAE | Federal Communications Commission, Experimental Radio Service, P.O. Box 358320, Pittsburgh, PA 15251-5320 |
| e. Special Temporary Authority (per application) | Corr & 159 | 45 | EAE | Federal Communications Commission, Experimental Radio Service, P.O. Box 358320, Pittsburgh, PA 15251-5320 |
| f. Additional fee required for any of the above applications that request confidentiality | Corr & 159 | 45 | EAE | Federal Communications Commission, Experimental Radio Service, P.O. Box 358320, Pittsburgh, PA 15251-5320 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 8. Ship Inspections | | | | |
| a. Inspection of Oceangoing Vessels Under Title III, Part II of the Communications Act (per inspection) | 801 | 715 | FFS | Federal Communications Commission, P.O. Box 358110, Pittsburgh, PA 15251-5110 |
| b. Inspection of Passenger Vessels Under Title III, Part III of the Communications Act (per inspection) | 801 | 370 | FCS | Federal Communications Commission, P.O. Box 358110, Pittsburgh, PA 15251-5110 |
| c. Inspection of Vessels Under the Great Lakes Agreement (per inspection) | 801 | 90 | FDS | Federal Communications Commission, P.O. Box 358110, Pittsburgh, PA 15251-5110 |
| d. Inspection of Vessels Under the Safety of Life at Sea (SOLAS) Convention (per inspection) | 801 | 620 | FES | Federal Communications Commission, P.O. Box 358110, Pittsburgh, PA 15251-5110 |
| e. Temporary Waiver of Inspection | 159 | 70 | FBS | Federal Communications Commission, P.O. Box 358110, Pittsburgh, PA 15251-5110 |
| 9. International Telecommunications Settlements Administrative Fee for Collections (per line item) | 99 | 2 | IAT | Licensees will be billed. |

4. Section 1.1104 is revised to read as follows:

**§1.1104 Schedule of charges for applications and other filings in the mass media services.**

| Action | FCC Form N No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 1. Commercial TV Stations | | | | |
| a. New and Major Change Construction Permits | 301 | 2,915 | MVT | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |
| b. Minor Change | 301 | 650 | MPT | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |
| c. Hearing (Major/Minor Change, Comparative New, or Comparative Renewal) | N/A | 7,765 | MWT | Federal Communications Commission, Mass Media Bureau, P.O. Box 358170, Pittsburgh, PA 15251-5170 |
| d. License | 302 | 200 | MJT | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |
| e. Assignment or Transfer | | | | |
| (i) Long Form (per station) | 314, 315 | 650 | MPT | Federal Communications Commission, Mass Media Bureau, P.O. Box 358350, Pittsburgh, PA 15251-5350 |
| (ii) Short Form (per station) | 316 | 95 | MDT | |
| f. Renewal | 303-S | 115 | MGT | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |
| g. Call Sign (New or Modification) | N/A | 65 | MBT | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |
| h. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | N/A | 115 | MGT | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |
| i. Extension of Time to Construct or Replacement of CP | 307 | 230 | MKT | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| j. Permit to Deliver Programs to Foreign Broadcast Stations | 308 | 65 | MBT | Federal Communications Commission, Mass Media Services, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| k. Petition for Rulemaking for New Community of License | 301, 302 | 1800 | MRT | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |
| l. Ownership Report (per station) | 323 | 45 | MAT | Federal Communications Commission, Mass Media Servcies, P.O. Box 358180, Pittsburgh, PA 15251-5180 |
| 2. Commercial Radio Stations | | | | |
| a. New and Major Change Construction Permit | | | | |
| (i) AM Station | 301 | 2,590 | MUR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| (ii) FM Station | 301 | 2,335 | MTR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358195, Pittsburgh, PA 15251-5195 |
| b. Minor Change | | | | |
| (i) AM Station | 301 | 650 | MPR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| (ii) FM Station | 301 | 650 | MPR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358195, Pittsburgh, PA 15251-5195 |
| c. Hearing (Major/Minor Change, Comparative New, or Comparative Renewal) | N/A | 7,765 | MWR | Federal Communications Commission, Mass Media Bureau, P.O. Box 358170, Pittsburgh, PA 15251-5170 |
| d. New License | | | | |
| (i) AM | 302 | 425 | MMR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| (ii) FM | 302 | 135 | MHR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358195, Pittsburgh, PA 15251-5195 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| (iii) AM Directional Antenna | 302 | 490 | MOR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| (iv) FM directional Antenna | 302 | 410 | MLR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358195, Pittsburgh, PA 15251-5195 |
| (v) AM Remote Control | 301 or 301A | 45 | MAR | Federal Communications Commission, Mass Media Servcies, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| e. Assignment or Transfer | | | | |
| (i) Long Form (per station) | 314, 315 | 650 | MPR | Federal Communications Commission, Mass Media Bureau, P.O. Box 358350 Pittsburgh, PA 15251-5350 |
| (ii) Short Form (per station) | 316 | 95 | MDR | |
| f. Renewal | | | | |
| (i) AM | 303-S | 115 | MGR | Federal Communications Commission, Mass Media Bureau, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| (ii) FM | 303-S | 115 | MGR | Federal Communications Commission, Mass Media Bureau, P.O. Box 358195, Pittsburgh, PA 15251-5195 |
| g. Call Sign (New or Modification) | N/A | 65 | MBR | Federal Communications Commission, Mass Media Services, P.O. Box 358165, Pittsburgh, PA 15251-5165 |
| h. Special Temporary Authority (other than to remain silent) | | | | |
| (i) AM | N/A | 115 | MGR | Federal Communications Commission, Mass Media Services, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| (ii) FM | N/A | 115 | MGR | Federal Communications Commission, Mass Media Services, P.O. Box 358195, Pittsburgh, PA 15251-5195 |
| i. Extension of Time to Construct or Replacement of CP | | | | |
| (i) AM | 307 | 230 | MKR | Federal Communications Commission, Mass Media Services, P.O. Box 358190, Pittsburgh, PA 15251-5190 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| (ii) FM | 307 | 230 | MKR | Federal Communications Commission, Mass Media Services, P.O. Box 358195, Pittsburgh, PA 15251-5195 |
| j. Permit to Deliver Programs to Foreign Broadcast Stations | 308 | 65 | MBR | Federal Communications Commission, Mass Media Services, P.O. Box 358190, Pittsburgh, PA 15251-5190 |
| k. Petition for Rulemaking for New Community License or Higher Class Channel | 301, 302 | 1,800 | MRR | Federal Communications Commission, Mass Media Services, P.O. Box 358195, Pittsburgh, PA 15251-5195 |
| l. Ownership report (per station) | 323 | 45 | MAR | Federal Communications Commission, Mass Media Services, P.O. Box 358180, Pittsburgh, PA 15251-5180 |
| 3. FM Translators | | | | |
| a. New or Major Change Construction Permit | 349 | 490 | MOF | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| b. License | 350 | 100 | MEF | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| c. Assignment or Transfer (per station) | 345, 316 | 95 | MDF | Federal Communications Commission, Mass Media Services, P.O. Box 358350, Pittsburgh, PA 15251-5350 |
| d. Renewal | 348 & 159 | 45 | MAF | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| e. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | N/A | 115 | MGF | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 4. TV Translators and LPTV Stations | | | | |
| a. New or Major Change Construction Permit | 346 | 490 | MOL | Federal Communications Commission, Mass Media Services, P.O. Box 358185, Pittsburgh, PA 15251-5185 |
| b. License | 347 | 100 | MEL | Federal Communications Commission, Mass Media Services, P.O. Box 358185, Pittsburgh, PA 15251-5185 |
| c. Assignment or Transfer (per station) | 345, 316 | 95 | MDL | Federal Communications Commission, Mass Media Services, P.O. Box 358350, Pittsburgh, PA 15251-5350 |
| d. Renewal | 348 | 45 | MAL | Federal Communications Commission, Mass Media Services, P.O. Box 358185, Pittsburgh, PA 15251-5185 |
| e. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | N/A | 115 | MGL | Federal Communications Commission, Mass Media Services, P.O. Box 358185, Pittsburgh, PA 15251-5185 |
| 5. Auxiliary Services (Includes Remote Pickup stations, TV Auxiliary Broadcast stations, Aural Broadcast STL and Intercity Relay stations, and Low Power Auxiliary stations) | | | | |
| a. Major Actions | 313 | 100 | MEA | Federal Communications Commission, Mass Media Services, P.O. Box 358700, Pittsburgh, PA 15251-5700 |
| b. Renewals | 313-R | 45 | MAA | Federal Communications Commission, Mass Media Services, P.O. Box 358700, Pittsburgh, PA 15251-5700 |
| c. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | N/A | 115 | MGA | Federal Communications Commission, Mass Media Services, P.O. Box 358700, Pittsburgh, PA 15251-5700 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 6. FM Boosters | | | | |
| a. New or Major Change Construction Permits | 349 | 490 | MOF | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| b. License | 350 | 100 | MEF | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| c. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | N/A | 115 | MGF | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| 7. TV Boosters | | | | |
| a. New or Major Change Construction Permits | 346 | 490 | MOF | Federal Communications Commission, Mass Media Services, P.O. Box 358185, Pittsburgh, PA 15251-5185 |
| b. License | 347 | 100 | MEF | Federal Communications Commission, Mass Media Services, P.O. Box 358185, Pittsburgh, PA 15251-5185 |
| c. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | Corr & 159 | 115 | MGF | Federal Communications Commission, Mass Media Services, P.O. Box 358185, Pittsburgh, PA 15251-5185 |
| 8. International Broadcast Station | | | | |
| a. New Station and Facilities Change CP | 309 | 1,960 | MSN | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| b. License | 310 | 445 | MNN | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| c. Assignment or Transfer (per station) | 314, 315, 316 | 70 | MCN | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |
| d. Renewal | 311 | 110 | MFN | Federal Communications Commission, Mass Media Services, P.O. Box 358200, Pittsburgh, PA 15251-5200 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| e. Frequency Assignment and Coordination (per frequency hour) | N/A | 45 | MAN | Federal Communications Commission, Mass Media Services, P.O. Box 358175, Pittsburgh, PA 15251-5175 |
| f. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | N/A | 115 | MGN | Federal Communications Commission, Mass Media Services, P.O. Box 358175, Pittsburgh, PA 15251-5175 |
| 9. Direct Broadcast Satellite | | | | |
| a. New or Major Change Construction Permit | | | | |
| (i) Application for Authorization to Construct a Direct Broadcast Satellite | N/A | 2,335 | MTD | Federal Communications Commission, Mass Media Services, P.O. Box 358210, Pittsburgh, PA 15251-5210 |
| (ii) Issuance of Construction Permit & Launch Authority | N/A | 22,630 | MXD | Federal Communications Commission, Mass Media Services, P.O. Box 358210, Pittsburgh, PA 15251-5210 |
| (iii) License to Operate Satellite | N/A | 650 | MPD | Federal Communications Commission, Mass Media Services, P.O. Box 358210, Pittsburgh, PA 15251-5210 |
| b. Hearing (Comparative New, Major/Minor Modifications, or Comparative Renewal) | N/A | 7,765 | MWD | Federal Communications Commission, Mass Media Services, P.O. Box 358170, Pittsburgh, PA 15251-5170 |
| c. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | N/A | 115 | MGD | Federal Communications Commission, Mass Media Services, P.O. Box 358210, Pittsburgh, PA 15251-5210 |

5. Section 1.1105 is revised to read as follows:

**§1.1105 Schedule of charges for applications and other filings in the common carrier services.**

| Action | FCC Form No. | Fee amount | Fee Type Code | Address |
|---|---|---|---|---|
| 1. All Common Carrier Services | | | | |
| a. Hearing (Comparative New or Major/Minor Modifications) | Corr & 159 | 7,765 | BHZ | Federal Communications Commission, Common Carrier Hearing, P.O. Box 358125, Pittsburgh, PA 15251-5125 |
| b. Development Authority (Same Charge as regular authority in service unless otherwise indicated) | | | | |
| c. Formal Complaints and Pole Attachment Complaints Filing Fee | Corr & 159 | 140 | CIZ | Federal Communications Commission, Common Carrier Enforcement, P.O. Box 358120, Pittsburgh, PA 15251-5120 |
| 2. Domestic Public Land Mobile Stations (includings Base, Dispatch, Control & Repeater Stations) | | | | |
| a. New or Additional Facility (per transmitter) | 401 & 159 | 265 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| b. Major Modifications (per transmitter) | 401 & 159 | 265 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| c. Fill in Transmitters (per transmitter) | 401 & 159 or 489 | 265 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| d. Major Amendment to a Pending Applications (per transmitter) | 401 & 159 | 265 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| e. Assignment or Transfer (i) First Call Sign on Application | 490 & 159 | 265 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| (ii) Each Additional Call Sign | 490 & 159 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| f. Partial Assignment (per call sign) | 401 & 159<br>490 & 155 | 265 | CMD | Federal Communications Commission, Common Carrier Land Mobile. P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| g. Renewal (per call sign) | 405 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| h. Minor Modification (per transmitter) | 489 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| i. Special Temporary Authority (per frequency/per location) | Corr & 159 | 230 | CLD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| j. Extension of Time to Construct (per application) | 489 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| k. Notice of Completion of Construction (per application) | 489 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| l. Auxiliary Test Station (per transmitter) | 401 & 159 | 230 | CLD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| m. Subsidiary Communications Service (per request) | 401 & 159 | 115 | CFD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| n. Reinstatement (per application) | 401 & 159 or 489 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| o. Combining Call Signs (per call sign) | 489 | 230 | CLD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| p. Standby Transmitter (per transmitter/per location) | 401 & 159 | 230 | CLD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| q. 900 MHz Nationwide Paging | | | | |
| (i) Renewal | | | | |
| (1) Network Organizer | 405 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| (2) Network Operator (per operator/per city) | 405 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| r. Air-Ground Inidividual License (per station) | | | | |
| (i) Initial License | 409 & 159 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| (ii) Renewal of License | 409 & 159 | 45 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| (iii) Modification of License | 409 & 159 | 45 | CAD | Federal Communications Commission, Cellular systems, P.O. Box 358130, Pittsuburgh, PA 15251-5130 |
| 3. Cellular Systems (per system) | | | | |
| a. New or Additional Facilities | 401 & 159 | 265 | CMC | Federal Communications Commission, Cellular systems, P.O. Box 358135, Pittsuburgh, PA 15251-5135 |
| b. Major Modification | 401 & 159 | 265 | CMC | Federal Communications Commission, Cellular systems, P.O. Box 358135, Pittsuburgh, PA 15251-5135 |
| c. Minor Modification | 489 | 70 | CDC | Federal Communications Commission, Cellular systems, P.O. Box 358135, Pittsuburgh, PA 15251-5135 |
| d. Assignment or Transfer (including partial) | 490 & 159 | 265 | CMC | Federal Communications Commission, Cellular systems, P.O. Box 358135, Pittsuburgh, PA 15251-5135 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| e. Renewal | 405 | 45 | CAC | Federal Communications Commission, Cellular systems, P.O. Box 358135, Pittsuburgh, PA 15251-5135 |
| f. Extension of Time to Complete Construction | 489 | 45 | CAC | Federal Communications Commission, Cellular systems, P.O. Box 358135, Pittsuburgh, PA 15251-5135 |
| g. Special Temporary Authority (per system) | Corr & 159 | 230 | CLC | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358135, Pittsuburgh, PA 15251-5135 |
| h. Combining Cellular Geographic Service Areas (per system) | Corr & 159 | 60 | CBC | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358135, Pittsuburgh, PA 15251-5135 |
| 4. Rural Radio (includes Central Office, Interoffice, or Relay Facilities) | | | | |
| a. New or Additional Facility (per transmitter) | 401 & 159 | 125 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsuburgh, PA 15251-5130 |
| b. Major Modifications (per transmiter) | 401 & 159 | 125 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsuburgh, PA 15251-5130 |
| c. Major Amendment to Pending Application (per transmitter) | 401 & 159 | 125 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsuburgh, PA 15251-5130 |
| d. Minor Modification (per transmitter) | 489 | 45 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsuburgh, PA 15251-5130 |
| e. Assignment or Transfer (i) First Call Sign on Application | 490 & 159 | 125 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsuburgh, PA 15251-5130 |
| (ii) Each Additional Call Sign | 490 & 159 | 45 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsuburgh, PA 15251-5130 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| (iii) Partial Assignment (per call sign) | 401 & 159, 490 & 159 | 125 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| f. Renewal (per call sign) | 405 | 45 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| g. Extension of Time to Complete Construction (per application) | 489 | 45 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| h. Notice of Completion of Contstruction (per application) | 489 | 45 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| i. Special Temporary Authority, (per frequency/per location) | Corr & 159 | 230 | CLR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| j. Reinstatement (per application) | 401 & 159 or 489 | 45 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| k. Combining Call Signs (per call sign) | 489 | 230 | CLR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| l. Auxiliary Test Station (per transmitter) | 401 & 159 | 230 | CLR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| m. Standby Transmitter (per transmitter/per location) | 401 & 159 | 230 | CLR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| 5. Offshore Radio Service (Mobile, Subscriber and Central Stations) | | | | |
| a. New or Additional Facility (per transmitter) | 401 & 159 | 125 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| b. Major Modifications (per transmitter) | 401 & 159 | 125 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsuburgh, PA 15251-5130 |
| c. Fill in transmitters (per transmitter) | 401 & 159 or 489 | 125 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| d. Major Amendment to Pending Application (per transmitter) | 401 & 159 | 125 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| e. Minor Modification (per transmitter) | 489 | 45 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| f. Assignment or Transfer | | | | |
| (i) First Call Sign on Application | 490 & 159 | 125 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| (ii) Each Additional Call Sign | 490 & 159 | 45 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| (iii) Partial Assignment (per call sign) | 401 & 159 490 & 159 | 125 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| g. Renewal (per call sign) | 405 & 159 | 45 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| h. Extension of Time to Complete construction (per application) | 489 | 45 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| i Reinstatement | 401 & 159 or 489 | 45 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| j. Notice of Completion of Construction (per application) | 489 | 45 | CAF | deral Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| k. Special Temporary Authority (per frequency/per location) | Corr & 159 | 230 | CLF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| l. Combining Call Signs (per call sign) | 489 | 230 | CLF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| m. Auxilary Test Station (per transmitter) | 401 & 159 | 230 | CLF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130 |
| n. Standby Transmitter (per transmitter/per location) | 401 & 159 | 230 | CLF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| 6. Point-to-Point Microwave and Local Television Transmission Service | | | | |
| a. Conditional License (per station) | 494 | 180 | CJP | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| b. Major Modifications of Conditional Licenses or License Authorization (per station) | 494 | 180 | CJP | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| c. Certification of completion of Construction (per station) | 494-A | 180 | CJP | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| d. Renewal (per licensed station) | 405 | 180 | CJP | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| e. Assignment or Transfer | | | | |
| (i) First Station on Application | 702 or 704 | 65 | CCP | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| (ii) Each Additional Station | 702 or 704 | 45 | CAP | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| f. Extension of Construction Authorization (per station) | 701 | 65 | CCP | Federal Communications Commission, Feeable Correspondence, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| g. Special Temporary Authority or Request for Waiver of Prior Construction Authorization (per request) | Corr & 159 | 85 | CEP | Federal CommunicationCommission, Commission, Common Carrier Dom. Radio, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| 7. Multipoint Distrubtion Service (including multichannel MDS) | | | | |
| a. Conditional License (per station) | 494 | 180 | CJM | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358155, Pittsburgh, PA 15251-5155 |
| b. Major Modification of Conditional Licenses or License Authorization (per station) | 494 | 180 | CJM | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358155, Pittsburgh, PA 15251-5155 |
| c. Certification of Completion of Construction (per channel) | 494-A | 525 | CPM | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358155, Pittsburgh, PA 15251-5155 |
| d. Renewal (per licensed station) | 405 | 180 | CJM | Federal Communications Commission, Common Carrier Dom. Radio,, P.O. Box 358155, Pittsburgh, PA 15251-5155 |
| e. Assignment or Transfer (i) First Station on Application | 702 & 704 | 65 | CCM | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358155, Pittsburgh, PA 15251-5155 |
| (ii) Each Additional Station | 702 & 704 | 45 | CAM | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358155, Pittsburgh, PA 15251-5155 |
| f. Extension of Construction Authorization (per station) | 701 | 130 | CHM | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358155, Pittsburgh, PA 15251-5155 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| g. Special Temporary Authority or Request for Waiver of Prior Construction Authorization (per request) | Corr & 159 | 85 | CEM | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358155, Pittsburgh, PA 15251-5155 |
| 8. Digital Electronic Messave Service | | | | |
| a. Conditional License (per nodal station) | 494 | 180 | CJL | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| b. Modification of Conditional License or License Authorization (per nodal station) | 494 | 180 | CJL | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| c. Certification of Completion of Construction (per nodal station) | 494-A | 180 | CJL | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| d. Renewal (per licensed nodal station) | 405 | 180 | CJL | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| e. Assignment or Transfer (i) First Station on Application | 702 or 704 | 65 | CCL | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| (ii) Each Additional Station | 702 or 704 | 45 | CAL | Federal Communications Commission, Common Carrier Dom. Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680 |
| f. Extension of Construction Authorization (per station) | 701 | 65 | CCL | Federal Communications Commission, Feeable Corr, P.O. Box 358305, Pittsburgh, PA 15251-5305 |
| g. Special Temporary Authority or Request for Waiver of Prior Construction Authorization (per request) | Corr & 159 | 85 | CEL | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| 9. International Fixed Public Radio (Public and control Stations) | | | | |
| a. Initial Construction Authorization (per station) | 407 & 159 | 590 | CSN | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| b. Assignment or Transfer (per application) | 702 or 704 | 590 | CSN | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| c. Renewal (per license) | 405 | 425 | CON | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| d. Modification (per station) | 403 | 425 | CON | Federal Communications Commission, Common Carrier International P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| e. Extension of Construction Authorization (per station) | 701 | 215 | CKN | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| f. Special Temporary Authority or Request for Waiver (per request) | Corr & 159 | 215 | CKN | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| 10. Fixed Satellite Transmit/Receive Earth Stations | | | | |
| a. Initial Application (per station) (i) Domestic | 493 & 159 | 1,755 | BAX | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| (ii) International | 493 & 159 | 1,755 | BAX | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| b. Modification of License (per station) (i) Domestic | 493 & 159 | 125 | CGX | Federal Communications Commission, Common Carrier Dom Earth Stations, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| (ii) International | 493 & 159 | 125 | CGX | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| c. Assignment or Transfer (i) First Station on application Domestic | 702 or 704 | 345 | CNX | Federal Communications Commission, Common Carrier Dom Earth Stations, P.O. Box 358160 Pittsburgh, PA 15251-5160 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| International | 702 or 704 | 345 | CNX | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| (ii) Each Additional Station Domestic | 702 or 704 | 115 | CFX | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| International | 702 or 704 | 115 | CFX | Federal Communications Commission, Common Carrier International, P.O. Box 358115,Pittsburgh, PA 15251-5115 |
| d. Developmental Station (per station) Domestic | 493 & 159 | 1,150 | CWX | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | 493 & 159 | 1,150 | CWX | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| e. Renewal of License (per station) Domestic | 405 | 125 | CGX | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | 405 | 125 | CGX | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| f. Special Temporary Authority or Waivers of Prior Construction Authorization (per request) Domestic | Corr & 159 | 125 | CGX | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | Corr & 159 | 125 | CGX | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 15251-5115 |
| g. Amendment of Application (per station) Domestic | Corr & 159 | 125 | CGX | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| International | Corr & 159 | 125 | CGX | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 15251-5115 |
| h. Extension of Construction Permit (per station) Domestic | 701 | 125 | CGX | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pitsburgh, PA 15251-5160 |
| International | 701 | 125 | CGX | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| 11. Fixed Satellite Small Transmit/Recieve Earth Stations (2 meters or less and operating in the 4/6 GHz frequency band) a. Lead Application | 493 & 159 | 3,885 | BDS | Federal Communications Commission, Common Carrier International, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| b. Routine Application (per station) | 493 & 159 | 45 | CAS | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| c. Modification of License (per station) | 493 & 159 | 125 | CGS | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| d. Assignment or Transfer (i) First Station on Application | 702 & 704 | 345 | CNS | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| (ii) Each Additional Station | 702 or 704 | 45 | CAS | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| e. Developmental Station (per station) | 493 & 159 | 1,150 | CWS | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| f. Renewal of License (per station) | 405 | 125 | CGS | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| g. Special Temporary Authority or Waivers of prior construction authorization (per request) | Corr & 159 | 125 | CGS | Federal Communications Commission, Common Carrier Dom. Earth Sttions, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| h. Amendment of Application (per station) | Corr & 159 | 125 | CGS | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| i Extension of Construction Permit (per station) | 701 | 125 | CGS | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| 12. Recieve only Earth Stations | | | | |
| a. Initial Application for Registration Domestic | 493 & 159 | 265 | CMO | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | 493 & 159 | 265 | CMO | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| b. Modification of License or Registration (per station) Domestic | 493 & 159 | 125 | CGO | Federal Communications Commission, Common Carrier Dom. Earth Stations,, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | 493 & 159 | 125 | CGO | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| c. Assignment or Transfer | | | | |
| (i) First Station on Application Domestic | 702 or 704 | 345 | CNO | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | 702 or 704 | 345 | CNO | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| (ii) Each Additional Station Domestic | 702 or 704 | 115 | CFO | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | 702 or 704 | 115 | CFO | Federal Communications Commission, International, P O Box 358115, Pittsburgh, PA 15251-5115 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| d. Renewal of License (per station) Domestic | 405 | 125 | CGO | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | 405 | 125 | CGO | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| e. Amendment of Application (per station) Domestic | Corr & 159 | 125 | CGO | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | Corr & 159 | 125 | CGO | Federal Communications Commission, Common Carrier, International P.O. Box 358115 Pittsburgh, PA 15251-5115 |
| f. Extension of Construction Permit (per station) Domestic | 701 | 125 | CGO | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | 701 | 125 | CGO | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 15251-5115 |
| g. Waivers (per request) Domestic | Corr & 159 | 125 | CGO | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| International | Corr & 159 | 125 | CGO | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 15251-5115 |
| 13. Fixed Satellite Very Small Aperture Terminal (VSAT) Systems | | | | |
| a. Initial Application (per system) | 493 & 159 | 6,465 | BGV | Federal Communications Commission, Common Carrier Dom. Earth Station, , P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| b. Modification of License (per system) | 493 & 159 | 125 | CGV | Federal Communications Commission, Common Carrier Dom. Earth Station, , P.O. Box 358160, Pittsburgh, PA 15251-5160 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| c. Assignment or Transfer of System | 702 or 704 | 1,730 | CZV | Federal Communications Commission, Common Carrier Dom. Earth Station, , P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| d. Developmental Station | 493 & 159 | 1,150 | CWV | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| e. Renewal of License (per system) | 405 | 125 | CGV | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| f. Special Temporary Authority or Waivers of Prior Construction Authorization (per request) | Corr & 159 | 125 | CGV | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| g. Amendment of Application (per system) | Corr & 159 | 125 | CGV | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| h. Extension of Construction Permit (per system) | 701 | 125 | CGV | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| 14. Mobile Satellite Earth Stations | | | | |
| a. Initial Application of Blanket Authorization | 493 & 159 | 6,465 | BGB | Federal Communications Commission, Common Carrier, Dom. Earth Stations P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| b. Initial Application for Individual Earth Station | 493 & 159 | 1,550 | CYB | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160. Pittsburgh, PA 15251-5160 |
| c. Modification of License (per system) | 493 & 159 | 125 | CGB | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160. Pittsburgh, PA 15251-5160 |
| d. Assignment or Transfer (per system) | 702 or 704 | 1,730 | CZB | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160. Pittsburgh, PA 15251-5160 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| e. Developmental Station | 493 & 159 | 1,150 | CWB | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| f. Renewal of License (per system) | 405 | 125 | CGB | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| g. Special Temporary Authority or Waivers of Prior Construction Authorization (per request) | Corr & 159 | 125 | CGB | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| h. Amendment of Application (per system) | Corr & 159 | 125 | CGB | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| i. Extension of Construction Permit (per system) | 701 | 125 | CGB | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| 5. Radio Determination Satellite Earth Station | | | | |
| a. Initial Applicaton of Blanket Authorization | 495 & 159 | 6,465 | BGH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| b. Initial Application for Individual Earth Station | 493 & 159 | 1,550 | CYH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| c. Modification of License (per system) | 493 & 159 | 125 | CGH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| d. Assignment or Transfer (per system) | 702 or 704 | 1,730 | CZH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| e. Developmental Station | 493 & 159 | 1,150 | CWH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| f. Renewal of License (per system) | 405 | 125 | CGH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| g. Special Temporary Authority or Waivers of Prior Construction Authorization (per request) | Corr & 159 | 125 | CGH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| h. Amendment of Application (per system) | Corr & 159 | 125 | CGH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| i. Extension of Construction Permit (per system) | 701 | 125 | CGH | Federal Communications Commission, Common Carrier Dom. Earth Stations, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| 16. Space Stations | | | | |
| a. Application for Authority to Construction | | | | |
| (i) Domestic | Corr & 159 | 2,330 | BBY | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| (ii) International | Corr & 159 | 2,330 | BBY | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 15251-5115 |
| b. Application for Authority to Launch & Operate | | | | |
| (i) Initial Application Domestic | Corr & 159 | 80,360 | BNY | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | Corr & 159 | 80,360 | BNY | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 15251-5115 |
| (ii) Replacement Satellite Domestic | Corr & 159 | 80, 360 | BNY | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| International | Corr & 159 | 80, 360 | BNY | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| c. Assignment or Transfer (per satellite) (i) Domestic | 702 or 704 | 5,740 | BFY | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| (ii) International | 702 or 704 | 5,740 | BFY | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| d. Modification (i) Domestic | Corr & 159 | 5,740 | BFY | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160, Pittsburgh, PA 15251-160 |
| (ii) International | Corr & 159 | 5,740 | BFY | Federal Communications commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| e. Special Temporary Authority or Waiver of Prior Construction Authorization (per request) (i) Domestic | Corr & 159 | 575 | CRY | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| (ii) International | Corr & 159 | 575 | CRY | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| f. Amendment of Application (i) Domestic | Corr & 159 | 1,150 | CWY | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| (ii) International | Corr & 159 | 1,150 | CWY | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| g. Extension of Construction Permit/Launch Authorization (per request) (i) Domestic | Corr & 159 | 575 | CRY | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| (ii) International | Corr & 159 | 575 | CRY | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 17. Space Stations (Low Orbit) | | | | |
| a. Application for Authority to Construction | | | | |
| (i) Domestic | Corr & 159 | 6,890 | CZW | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| (ii) International | Corr & 159 | 6,890 | CZW | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 1525-5115 |
| b. Application for Authority to Launch & Operate | | | | |
| (i) Domestic | Corr & 159 | 241,080 | CLW | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| (ii) International | Corr & 159 | 241,080 | CLW | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| c. Assignment or Transfer (per satellite) | | | | |
| (i) Domestic | 702 or 704 | 6,890 | CZW | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358115, Pittsburgh, PA 1525 |
| (ii) International | 702 or 704 | 6,890 | CZW | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| d. Modification (per request) | | | | |
| (i) Domestic | Corr & 159 | 17,220 | CGW | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358115, Pittsburgh, PA 1525 |
| (ii) International | Corr & 159 | 17,220 | CGW | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 15251-5115 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| e. Special Temporary Authority or Waiver of Prior Construction Authorization (per request) | | | | |
| (i) Domestic | Corr & 159 | 1,725 | CXW | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| (ii) International | Corr & 159 | 1,725 | CXW | Federal Communications Commission, Common Carrier International, , P.O. Box 358115, Pittsburgh, PA 15251-5115 International, P.O. Box 358115 |
| f. Amendment of Application | | | | |
| (i) Domestic | Corr & 159 | 3,445 | CAW | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358160, Pittsburgh, PA 15251-5160 |
| (ii) International | Corr & 159 | 3,445 | CAW | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 1525 |
| g. Extension of Construction Permit/Launch Authorization (per request) | | | | |
| (i) Domestic | Corr & 159 | 1,725 | CXW | Federal Communications Commission, Common Carrier Dom. Satellites, P.O. Box 358115 Pittsburgh, PA 15251-5115 |
| (ii) International | Corr & 159 | 1,725 | CXW | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| 18. Section 214 Applications | | | | |
| a. Overseas Cable Construction | Corr & 159 | 10,480 | BIT | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 15251-5115 |
| b. Cable Landing License | | | | |
| (i) Common Carrier | Corr & 159 | 1,180 | CXT | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 51251-5115 |
| (ii) Replacement Satellite | Corr & 159 | 11,655 | BJT | Federal Communications Commission, Common Carrier International, P.O. Box 358115, Pittsburgh, PA 51251-5115 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| c. Domestic Cable Construction | Corr & 159 | 705 | CUT | Federal Communications Commission, Common Carrier Dom. Services, P.O. Box 358145, Pittsburgh, PA 51251-5145 |
| d. All other 214 Applications (i) Domestic | Corr & 159 | 705 | CUT | Federal Communications Commission, Common Carrier Dom. Services P.O. Box 358145, Pittsburgh, PA 51251-5145 |
| (ii) International | Corr & 159 | 705 | CUT | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 51251-5115 |
| e. Special Temporary Authority (all services) (i) Domestic | Corr & 159 | 705 | CUT | Federal Communications Commission, Common Carrier dom. Services, P.O. Box 358145 Pittsburgh, PA 51251-5145 |
| (ii) International | Corr & 159 | 705 | CUT | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 51251-5115 |
| f. Assignments or Transfers (all services) (i) Domestic | Corr & 159 | 705 | CUT | Federal Communications Commission, Common Carrier Dom. Services, P.O. Box 358145 Pittsburgh, PA 51251-5145 |
| (ii) International | Corr & 159 | 705 | CUT | Federal Communications Commission, Common Carrier International, P.O. Box 358115 Pittsburgh, PA 51251-5115 |
| 19. Recognized Private Operating Status (per application) | Corr & 159 | 705 | CUG | Federal Communications Commission, Common Carrier , International, P.O. Box 358115 Pittsburgh, PA 51251-5115 |
| 20. Telephone Equipment Registration | Corr & 159 | 180 | CJQ | Federal Communications Commission, Dom. Services, P.O. Box 358145, Pittsburgh, PA 15251-5145 |
| 21. Tariff Filings a. Filing Fees | Corr & 159 | 565 | CQK | Federal Communications Commission, Tariff filings, P.O. Box 358150, Pittsburgh, PA 15251-5150 |
| b. Special Permission Filing (per filing) (Waiver of any Rule in Part 61 of the Commission's Rules) | Corr & 159 | 565 | CQK | Federal Communications Commission, Tariff filings, P.O. Box 358150, Pittsburgh, PA 15251-5150 |

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 22. Accounting and Audits<br>a. Field Audit | N/A | 71,510 | N/A | Federal Communications Commission, Accounting & Audits, P.O. Box 358340, Pittsburgh, PA 15251-5340 |
| b. Review of Attest Audit | N/A | 39,030 | N/A | Federal Communications Commission, Accounting & Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140 |
| c. Review of Depreciation Update Study (Single State) | Corr & 159 | 23,750 | BKA | Federal Communications Commission, Accounting & Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140 |
| (i) Each Additional State | Corr & 159 | 785 | CVA | Federal Communications Commission, Accounting and Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140 |
| d. Interpretation of Accounting Rules (per request) | Corr & 159 | 3.315 | BCA | Federal Communications Commission, Accounting and Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140 |
| e. Petition for Waiver (per petition) (Waiver of Part 69 Tariff Rules & Parts 36, 63 & 69 Accounting Rules) | Corr & 159 | 5,350 | BEA | Federal Communications Commission, Accounting and Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140 |

6. Section 1.1106 is revised to read as follows:

**§1.1106 Schedule of charges for applications and other filings in the cable television services.**

| Action | FCC Form No. | Fee Amount | Fee Type Code | Address |
|---|---|---|---|---|
| 1. Cable Television Service | | | | |
| a. Cable Television Relay Service | | | | |
| (i) Construction Permit | 327 & 159 | 180 | TIC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |
| (ii) Assignment or Transfer | 327 & 159 | 180 | TIC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |
| (iii) Renewal | 327 & 159 | 180 | TIC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |
| (iv) Modification | 327 & 159 | 180 | TIC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |
| (v) Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | 327 & 159 | 115 | TGC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |
| b. Cable Special Relief Petition | N/A | 910 | TQC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |
| c. 76.12 Registration Statement (per statement) | N/A | 45 | TAC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |
| d. Aeronautical Frequency Usage Notifications (per notice) | N/A | 45 | TAC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |
| e. Aeronautical Frequency Usage Waivers (per waiver) | N/A | 45 | TAC | Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205 |

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | |
|---|---|
| *In the matter of* | ) |
| | ) |
| AMENDMENT OF PARTS 0, 1, 25, 43, 64, AND | ) |
| 73 OF THE COMMISSION'S RULES TO REFLECT | ) |
| A REORGANIZATION ESTABLISHING THE | ) |
| INTERNATIONAL BUREAU | ) |

**ORDER**

Adopted: September 27, 1994 Released: October 19, 1994

By the Commission:

1. The Commission has before it for consideration a set of proposed rule changes creating a new International Bureau. The proposed changes affect the Office of International Communications, Mass Media Bureau, Common Carrier Bureau, Field Operations Bureau, Private Radio Bureau, and Office of Engineering and Technology. Implementation of the proposed changes requires amendment of Parts 0, 1, 25, 43, 64, and 73 of title 47 of the Code of Federal Regulations.

2. In order to create an effective organization in which to centralize and consolidate the Commission's international policies and activities, the Commission has determined to establish the new International Bureau. The amendments adopted in this Order reflect the creation of the new bureau, describe its functions, and set forth the extent and nature of the authority delegated by the Commission to the Chief of the International Bureau.

3. The amendments adopted herein pertain to agency organization. The prior notice procedure and effective date provisions of section 553 of the Administrative Procedure Act are therefore inapplicable. Authority for the amendments adopted herein is contained in section 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended.

4. IT IS HEREBY ORDERED, effective upon release of this Order, that Parts 0, 1, 25, 43, 64, and 73 of the Commission's rules and regulations, set forth in title 47 of the

Code of Federal Regulations, be amended as set forth in the "Final Rules" attached as an appendix to this Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## Final Rules

Parts 0, 1, 25, 43, 64, and 73 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

## PART 0: COMMISSION ORGANIZATION

1. Section 0.5 is amended by deleting existing subparagraph (a)(13) and inserting in its place the following:

(13) International Bureau.

2. Section 0.11 is amended by deleting existing subparagraph (a)(11).

3. Section 0.21 is amended by deleting the words "domestic" and "interagency" from existing paragraph (h), deleting existing paragraph (i), and redesignating existing paragraph (j) as new paragraph (i).

4. Section 0.31 is amended by deleting existing paragraph (b) and inserting in its place the following:

(b) Represent the Commission at various national conferences and meetings (and, in consultation with the International Bureau, at various international conferences and meetings) devoted to the progress of communications and the development of technical and other information and standards, and serve as Commission coordinator for the various national conferences when appropriate.

5. Section 0.31 is further amended by deleting the last six words of paragraph (f).

6. Section 0.41 is amended by deleting existing paragraph (c) and redesignating existing paragraphs (d) through (i) as new paragraphs (c) through (h).

7. Section 0.41 is further amended by deleting existing paragraph (j) and inserting the following new paragraph (i):

(i) To cooperate with the International Bureau on all matters pertaining to space satellite communications.

8. Section 0.41 is further amended by redesignating existing paragraphs (k) through (p) as new paragraphs (j) through (o).

9. The heading "OFFICE OF INTERNATIONAL COMMUNICATIONS," which appears immediately before § 0.51, is revised to read as follows: "INTERNATIONAL BUREAU."

10. Section 0.51 is amended by deleting all existing text and inserting in its place the following:

**§ 0.51 Functions of the Bureau.**

The International Bureau has the following duties and responsibilities:

(a) To initiate and direct the development and articulation of international telecommunications policies, consistent with the priorities of the Commission;

(b) To advise the Chairman and Commissioners on matters of international telecommunications policy, and on the adequacy of the Commission's actions to promote the vital interests of the American public in international commerce, national defense, and foreign policy;

(c) To develop, recommend, and administer policies, rules, standards, and procedures for the authorization and regulation of international telecommunications facilities and services, domestic and international satellite systems, and international broadcast services;

(d) To monitor compliance with the terms and conditions of authorizations and licenses granted by the Bureau, and to pursue enforcement actions in conjunction with appropriate bureaus and offices;

(e) To represent the Commission on international telecommunications matters at both domestic and international conferences and meetings, and to direct and coordinate the Commission's preparation for such conferences and meetings;

(f) To serve as the single focal point within the Commission for cooperation and consultation on international telecommunications matters with other federal agencies, international or foreign organizations, and appropriate regulatory bodies and officials of foreign governments;

(g) To develop, coordinate with other federal agencies, and administer the regulatory assistance and training programs for foreign administrations to promote telecommunications development;

(h) To provide advice and technical assistance to U.S. trade officials in the negotiation and implementation of telecommunications trade agreements, and consult with other bureaus and offices as appropriate;

(i) To conduct economic, legal, technical, statistical, and other appropriate studies, surveys, and analyses in support of international telecommunications policies and programs.

(j) To collect and disseminate within the Commission information and data on international telecommunications policies, regulatory and market developments in other countries, and international organizations;

(k) To work with the Office of Legislative Affairs to coordinate the Commission's activities on significant matters of international policy with appropriate Congressional offices;

(*l*) To promote the international coordination of spectrum allocations and frequency and orbital assignments so as to minimize cases of international radio interference involving U.S. licensees;

(m) To direct and coordinate, in consultation with other bureaus and offices as appropriate, negotiation of international agreements to provide for arrangements and procedures for coordination of radio frequency assignments to prevent or resolve international radio interference involving U.S. licensees;

(n) To ensure fulfillment of the Commission's responsibilities under international agreements and treaty obligations, and, consistent with Commission policy, to ensure that the Commission's regulations, procedures, and frequency allocations comply with the mandatory requirements of all applicable international and bilateral agreements;

(o) To oversee and, as appropriate, administer activities pertaining to the international consultation, coordination, and notification of U.S. frequency and orbital assignments, including activities required by bilateral agreements, the international Radio Regulations, and other international agreements;

(p) To advise the Chairman on priorities for international travel and develop, coordinate, and administer the international travel plan; and

(q) To develop, recommend, and administer policies, rules, and regulations implementing the Commission's oversight responsibilities regarding COMSAT's participation in INTELSAT and INMARSAT.

11. Section 0.61 is amended by deleting existing paragraph (b) and redesignating existing paragraphs (c) through (h) as new paragraphs (b) through (g).

12. Section 0.91 is amended by revising the first sentence thereof to read as follows:

The Common Carrier Bureau develops, recommends, and administers policies and programs for the regulation of services, facilities and practices of

entities (excluding public coast stations in the maritime mobile service and multi-point and multi-channel multi-point distribution services) which furnish interstate communications service or interstate access service for hire -- whether by wire, terrestrial radio, or cable -- and of ancillary operations related to the provision or use of such services. The Bureau also develops, recommends, and administers policies and programs for the regulation of the rates, terms, and conditions under which communications entities furnish interstate communications service, interstate access service, and (in cooperation with the International Bureau) foreign communcations service for hire -- whether by wire, terrestrial radio, cable, or satellite.

13. Section 0.91 is further amended by deleting existing paragraph (b) and redesignating existing paragraph (c) as new paragraph (b).

14. Section 0.91 is further amended by deleting existing paragraph (d) and redesignating existing paragraphs (e) through (j) as new paragraphs (c) through (h).

15. Section 0.91 is further amended by deleting existing paragraph (k) and adding a new paragraph (i) reading as follows:

(i) Acts on matters affecting public coast stations in the maritime service which concern tariffs, terms of interconnection, and rate or economic analysis.

16. Section 0.91 is further amended by redesignating existing paragraphs (*l*) through (n) as new paragraphs (j) through (*l*).

17. Section 0.111 is amended by deleting existing paragraph (e) and inserting in its place the following:

(e) Participate in international conferences dealing with monitoring and measurements; serve, in consultation with the International Bureau, as the point of contact for the United States government in matters of international monitoring, fixed and mobile direction finding, and interference elimination.

18. Section 0.131 is amended by deleting existing paragraph (b) and redesignating existing paragraphs (c) through (k) as new paragraphs (b) through (j).

19. Section 0.241 is amended by deleting existing subparagraph (a)(6) and redesignating existing subparagraphs (a)(7) through (a)(9) as new subparagraphs (a)(6) through (a)(8).

20. Subpart B of Part 0 is further amended by adding a new section 0.261 (together with a new header immediately preceding it), reading as follows:

INTERNATIONAL BUREAU

**§ 0.261 Authority delegated.**

(a) Subject to the limitations set forth in paragraph (b) of this section, the Chief, International Bureau, is hereby delegated the authority to perform the functions and activities described in § 0.51 of this part, including without limitation the following:

(1) To recommend rulemakings, studies, and analyses (legal, engineering, social, and economic) of various petitions for policy or rule changes submitted by industry or the public, and to assist the Commission in conducting the same;

(2) To assume the principal representational role on behalf of the Commission in international conferences, meetings, and negotiations, and direct Commission preparation for such conferences, meetings, and negotiations with other bureaus and offices, as appropriate.

(3) To act upon applications for international telecommunications facilities and services pursuant to Part 23 and relevant portions of Part 63 of this chapter, and coordinate with the Common Carrier Bureau as appropriate;

(4) To act upon applications for international and domestic satellite systems and earth stations pursuant to Part 25 of this chapter;

(5) To act upon applications for cable landing licenses pursuant to section 1.767 of this chapter;

(6) To act upon requests for designation of Recognized Private Operating Agency (RPOA) status under Part 63 of this chapter;

(7) To act upon applications relating to international broadcast station operations, or for permission to deliver programming to foreign stations, under Part 73 of this chapter;

(8) To administer and enforce the policies and rules on international settlements under Part 64 of this chapter;

(9) To administer portions of Part 2 of this chapter dealing with international treaties and call sign provisions, and to make call sign assignments, individually and in blocks, to U.S. government agencies and FCC operating bureaus;

(10) To act upon applications for closure of public coast stations in the maritime service under Part 63 of this chapter;

(11) To administer Commission participation in the International Telecommunication Union (ITU) Fellowship telecommunication training program for foreign officials offered through the U.S. Telecommunications Training Institute;

(12) In consultation with the affected Bureaus and Offices, to recommend revision of Commission rules and procedures as appropriate to conform to the outcomes of international conferences, agreements, or treaties;

(13) To notify the ITU of the United States' terrestrial and satellite assignments for inclusion in the Master International Frequency Register;

(14) To conduct studies and compile such data relating to international telecommunications as may be necessary for the Commission to develop and maintain an adequate regulatory program; and

(15) To interpret and enforce rules and regulations pertaining to matters under its jurisdiction.

(b) Notwithstanding the authority delegated in paragraph (a) of this section, the Chief, International Bureau, shall not have authority:

(1) To act on any application, petition, pleading, complaint, enforcement matter, or other request that (a) presents new or novel arguments not previously considered by the Commission; (b) presents facts or arguments which appear to justify a change in Commission policy; or (c) cannot be resolved under outstanding precedents and guidelines after consultation with appropriate Bureaus or Offices.

(2) To issue notices of proposed rulemaking, notices of inquiry, or reports or orders arising from rulemaking or inquiry proceedings;

(3) To act upon any application for review of actions taken by the Chief, International Bureau, pursuant to delegated authority, which application complies with § 1.115 of this chapter;

(4) To act upon any formal or informal radio application or section 214 application for common carrier services which is in hearing status;

(5) To designate for hearing any applications except (a) mutually exclusive applications for radio facilities filed pursuant to Parts 23, 25, or 73 of this chapter; and (b) applications for facilities where the issues presented relate solely to whether the applicant has complied with outstanding precedents and guidelines; or

(6) To impose, reduce, or cancel forfeitures pursuant to section 203 or section 503(b) of the Communications Act of 1934, as amended, in amounts of more than $20,000.

21. Subpart B of Part 0 is further amended by adding a new section 0.262, reading as follows:

**§ 0.262 Record of actions taken.**

The application and authorization files in the appropriate central files of the International Bureau are designated as the Commission's official records of actions by the Chief, International Bureau, pursuant to authority delegated to him.

22. Section 0.291 is amended by deleting existing paragraph (e) and inserting in its place the following:

(e) *Authority to designate for hearing.* The Chief, Common Carrier Bureau, shall not have authority to designate for hearing any formal complaints which present novel questions of fact, law, or policy which cannot be resolved under outstanding precedents or guidelines. The Chief, Common Carrier Bureau, shall not have authority to designate for hearing any applications except: (1) Applications for radio facilities filed pursuant to Parts 21 or 22 of this chapter which are mutually exclusive and (2) applications for facilities where the issues presented relate solely to whether the applicant has complied with outstanding precedents and guidelines.

23. Section 0.291 is further amended by deleting existing paragraph (h) and inserting in its place the following:

(h) *Authority concerning rulemaking and investigatory proceedings.* The Chief, Common Carrier Bureau, shall not have authority to issue notices of proposed rulemaking, notices of inquiry, or reports or orders arising from either of the foregoing, except that the Chief, Common Carrier Bureau, shall have authority, in consultation and coordination with the Chief, International Bureau, to issue and revise a manual on the details of the reporting requirements for international carriers set forth in § 43.61(d) of this chapter.

24. Section 0.291 is further amended by deleting existing paragraph (i) and inserting in its place the following:

(i) *Authority concerning public coast stations in the maritime service.* The Chief, Common Carrier Bureau, shall have authority to act on matters affecting public coast stations in the maritime service which concern tariffs and rates and terms of interconnection.

25. Section 0.291 is further amended by deleting existing paragraph (d) and redesignating existing paragraphs (e) through (i) as new paragraphs (d) through (h).

26. Section 0.332 is amended by deleting existing paragraph (b) and redesignating existing paragraphs (c) through (f) as new paragraphs (b) through (e).

27. Section 0.332 is further amended by deleting existing paragraph (g) and inserting in its place, as new paragraph (f), the following:

(f) Requests involving coordination with other Federal or state agencies when appropriate -- Office of General Counsel, Office of Engineering and Technology or operating bureau.

28. Section 0.332 is further amended by redesignating existing paragraphs (h) and (i) as new paragraphs (g) and (h).

29. Section 0.401 is amended by deleting existing subparagraph (b)(1) (not including the "Note" which follows it) and inserting in its place the following:

(1) Applications and filings submitted by mail shall be addressed to the Mellon Bank in Pittsburgh, Pennsylvania. The bank maintains separate post office boxes for the receipt of different types of applications. It will also establish special post office boxes to receive responses to special filings such as applications filed in response to "filing windows" established by the Commission. The address for the submission of filings will be established in the Public Notice announcing the filing dates. In all other cases, applications and filings submitted by mail should be sent to the addresses listed in the appropriate fee rules in Subpart G of Part 1 of this chapter (§§ 1.102 through 1.1107).

30. Section 0.401 is further amended by deleting the parenthetical "(§§ 1.1102 - 1.1105)" from subparagraph (b)(2) and replacing it with the following: "(§§ 1.1102 - 1.1107)."

31. Section 0.453 is amended by deleting existing subparagraph (d)(1) and redesignating existing subparagraphs (d)(2) and (d)(3) as new subparagraphs (d)(1) and (d)(2).

32. Section 0.453 is further amended by deleting existing subparagraphs (g)(2) and (g)(3) and inserting in their place the following new paragraph (g)(2):

> (2) Section 214 applications and related files, to the extent that they concern domestic communications facilities and services.

33. Section 0.453 is further amended by adding a new subparagraph (m) to read as follows:

> (m) *The International Bureau Reference Room.* Except to the extent they are excluded from routine public inspection under another section of this chapter, the following documents, files, and records are available for inspection at this location:
>
> (1) Satellite and earth station application files and related materials under Part 25;
>
> (2) Section 214 applications and related files under Part 63, to the extent that they concern international communications facilities and services;
>
> (3) International Fixed Public Radio applications and related files under Part 23;
>
> (4) Files relating to submarine cable landing licenses and applications for such licenses since June 30, 1934, except for maps showing the exact location of submarine cables, which are withheld from inspection under section 4(j) of the Communications Act (see section 0.457(c)(1)(i) of this chapter);
>
> (5) Files relating to international settlements under Part 64 of this chapter;
>
> (6) Documents relating to INTELSAT or INMARSAT;
>
> (7) International broadcast applications, applications for permission to deliver programming to foreign stations, and related files under Part 73; and

(8) International settlement agreements and contracts and international cable agreements.

34. Section 0.455 is amended by deleting existing subparagraph (b)(12) and inserting in its place the following:

(12) All applications for common carrier authorizations acted upon by the Comon Carrier Bureau, and files relating thereto.

35. Section 0.455 is further amended by deleting existing subparagraph (b)(14) and redesignating existing subparagraphs (b)(15) and (b)(16) as new subparagraphs (b)(14) and (b)(15).

36. Section 0.455 is further amended by adding a new subparagraph (g) to read as follows:

(g) *International Bureau.* The treaties and other international and bilateral agreements listed in section 73.1650 of this title are available for inspection in the office of the Chief, Planning and Negotiations Division, International Bureau.

**PART 1: PRACTICE AND PROCEDURE**

37. Section 1.1104 is amended by deleting existing action category 8, and all subsections thereof, and redesignating category 9 as category 8.

Section 1.1105 is amended by deleting action categories 9, 10, 11, 12, 13, 14, 15, 16, 17, and 19, and all subsections thereof.

38. Section 1.1105 is further amended by deleting existing action category 18 and replacing it with the following new action category 9:

| Action | FCC Form No. | Fee amount | Fee Type Code | Address |
|---|---|---|---|---|
| 9. Section 214 Applications: | | | | |

| | | | | |
|---|---|---|---|---|
| a. Domestic Cable Construction | Corr. & 159 | $705 | CUT | Federal Communications Commission, Common Carrier Dom. Services, P.O. Box 358145, Pittsburgh, PA 15251-5145. |
| b. All Other Domestic 214 Applications | Corr. & 159 | 705 | CUT | Federal Communications Commission, Common Carrier Dom. Services, P.O. Box 358145, Pittsburgh, PA 15251-5145. |
| c. Special Temporary Authority (all domestic services) | Corr. & 159 | 705 | CUT | Federal Communications Commission, Common Carrier Dom. Services, P.O. Box 358145, Pittsburgh, PA 15251-5145. |
| d. Assignments or Transfers (all domestic services) | Corr. & 159 | 705 | CUT | Federal Communications Commission, Common Carrier Dom. Services, P.O. Box 358145, Pittsburgh, PA 15251-5145. |

39. Section 1.1105 is further amended by redesignating existing action categories 20, 21, and 22 as new categories 10, 11, and 12 in section 1.1105.

40. Subpart G of Part 1 is further amended by redesignating existing sections 1.1107 through 1.1118 as sections 1.1108 through 1.1119.

41. Subpart G of Part 1 is further amended by adding a new section 1.1107, to read as follows:

| Action | FCC Form No. | Fee amount | Fee Type Code | Address |
|---|---|---|---|---|
| 1. International Broadcast Stations | | | | |
| a. New Station and Facilities Change CP | 309 | $1,960 | MSN | Federal Communications Commission, Planning and Negotiations Div'n, P.O. Box 358200, Pittsburgh, PA 15251-5200. |
| b. License | 310 | 445 | MNN | Federal Communications Commission, Planning and Negotiations Div'n, P.O. Box 358200, Pittsburgh, PA 15251-5200. |
| c. Assignment or Transfer (per station) | 314, 315, 316 | 70 | MCN | Federal Communications Commission, Planning and Negotiations Div'n, P.O. Box 358200, Pittsburgh, PA 15251-5200. |
| d. Renewal | 311 | 110 | MFN | Federal Communications Commission, Planning and Negotiations Div'n, P.O. Box 358200, Pittsburgh, PA 15251-5200. |
| e. Frequency Assignment and Coordination (per frequency hour) | N/A | 45 | MAN | Federal Communications Commission, Planning and Negotiations Div'n, P.O. Box 358175, Pittsburgh, PA 15251-5175. |

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|---|---|---|---|---|
| f. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) | N/A | 115 | MGN | Federal Communications Commission, Planning and Negotiations Div'n, P.O. Box 358175, Pittsburgh, PA 15251-5175. |
| 2. International Fixed Public Radio (Public and Control Stations): | | | | |
| a. Initial Construction Authorization (per station) | 407 & 159 | 590 | CSN | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| b. Assignment or Transfer (per application) | 702 or 704 | 590 | CSN | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| c. Renewal (per license) | 405 | 425 | CON | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| d. Modification (per station) | 403 | 425 | CON | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| e. Extension of Construction Authorization (per station) | 701 | 215 | CKN | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| f. Special Temporary Authority or Request for Waiver (per request) | Corr & 159 | 215 | CKN | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| 3. Fixed Satellite Transmit/Receive Earth Stations: | | | | |
| a. Initial Application (per application): | | | | |
| (i) Domestic | 493 & 159 | 1,755 | BAX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 493 & 159 | 1,755 | BAX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| b. Modification of License (per station): | | | | |
| (i) Domestic | 493 & 159 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |

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|---|---|---|---|---|
| (ii) International | 493 & 159 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| c. Assignment or Transfer: (i) First station on application: (a) Domestic | 702 or 704 | 345 | CNX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| temp (b) International | 702 or 704 | 345 | CNX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| (ii) Each additional station: (a) Domestic | 702 or 704 | 115 | CFX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (b) International | 702 or 704 | 115 | CFX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| d. Developmental Station (per station): (i) Domestic | 493 & 159 | 1,150 | CWX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 493 & 159 | 1,150 | CWX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| e. Renewal of License (per station): (i) Domestic | 405 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 405 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| f. Special Temporary Authority or Waivers of Prior Construction Authorization (per request): | | | | |

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|---|---|---|---|---|
| (i) Domestic | Corr. & 159 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| g. Amendment of Application (per request): | | | | |
| (i) Domestic | Corr. & 159 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| h. Extension of Construction Permit (per station): | | | | |
| (i) Domestic | 701 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 701 | 125 | CGX | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| 4. Fixed Satellite Small Transmit/Receive Earth Stations (2 meters or less and operating in the 4/6 GHz frequency band): | | | | |
| a. Lead Application | 493 & 159 | 3,885 | BDS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| b. Routine Application (per station) | 493 & 159 | 45 | CAS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| c. Modification of License (per station) | 493 & 159 | 125 | CGS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| d. Assignment or Transfer | | | | |
| (i) First station on application | 702 & 704 | 345 | CNS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |

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| (ii) Each additional station | 702 or 704 | 45 | CAS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| e. Developmental Station (per station) | 493 & 159 | 1,150 | CWS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| f. Renewal of License (per station) | 405 | 125 | CGS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| g. Special Temporary Authority or Waivers of Prior Construction Authorization (per request) | Corr. & 159 | 125 | CGS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| h. Amendment of Application (per station) | Corr. & 159 | 125 | CGS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| i. Extension of Construction Permit (per station) | 701 | 125 | CGS | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| 5. Receive Only Earth Stations: | | | | |
| a. Initial Application for Registration: | | | | |
| (i) Domestic | 493 & 159 | 265 | CMO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 493 & 159 | 265 | CMO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| b. Modification of License or Registration (per station): | | | | |
| (i) Domestic | 493 & 159 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 493 & 159 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| c. Assignment or Transfer: | | | | |
| (i) First station on application: | | | | |

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|---|---|---|---|---|
| (a) Domestic | 702 or 704 | 345 | CNO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (b) International | 702 or 704 | 345 | CNO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| (ii) Each additional station:<br>(a) Domestic | 702 or 704 | 115 | CFO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (b) International | 702 or 704 | 115 | CFO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| d. Renewal of License (per station):<br>(i) Domestic | 405 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 405 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| e. Amendment of Application (per station):<br>(i) Domestic | Corr. & 159 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| f. Extension of Construction Permit (per station):<br>(i) Domestic | 701 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 701 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| g. Waivers (per request): | | | | |

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|---|---|---|---|---|
| (i) Domestic | Corr. & 159 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 125 | CGO | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| 6. Fixed Satellite Very Small Aperture Terminal (VSAT) Systems: | | | | |
| a. Initial Application (per system) | 493 & 159 | 6,465 | BGV | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| b. Modification of License (per system) | 493 & 159 | 125 | CGV | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| c. Assignment or Transfer of System | 702 or 704 | 1,730 | CZU | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| d. Developmental Station | 493 & 159 | 1,150 | CWV | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| e. Renewal of License | 405 | 125 | CGV | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| f. Special Temporary Authority or Waivers of Prior Construction Authorization (per request) | Corr. & 159 | 125 | CGV | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| g. Amendment of Application (per system) | Corr. & 159 | 125 | CGV | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| h. Extension of Construction Permit (per system) | 701 | 125 | CGV | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| 7. Mobile Satellite Earth Stations: | | | | |
| a. Initial Application of Blanket Authorization | 493 & 159 | 6,465 | BGB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| b. Initial Application for Individual Earth Station | 493 & 159 | 1,550 | CYB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |

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|---|---|---|---|---|
| c. Modification of License (per system) | 493 & 159 | 125 | CGB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| d. Assignment or Transfer (per system) | 702 or 704 | 1,730 | CZB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| e. Developmental Station | 493 & 159 | 1,150 | CWB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| f. Renewal of License (per system) | 405 | 125 | CGB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| g. Special Temporary Authority or Waivers of Prior Construction Authorization (per request) | Corr. & 159 | 125 | CGB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| h. Amendment of Application (per system) | Corr. & 159 | 125 | CGB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| i. Extension of Construction Permit (per system) | 701 | 125 | CGB | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| 8. Radio Determination Satellite Earth Station: | | | | |
| a. Initial Application of Blanket Authorization | 493 & 159 | 6,465 | BGH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| b. Initial Application for Individual Earth Station | 493 & 159 | 1,550 | CYH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| c. Modification of License (per system) | 493 & 159 | 125 | CGH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| d. Assignment or Transfer (per system) | 702 or 704 | 1,730 | CZH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| e. Developmental Station | 493 & 159 | 1,150 | CWH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |

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|---|---|---|---|---|
| f. Renewal of License (per system) | 405 | 125 | CGH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| g. Special Temporary Authority or Waivers of Prior Construction Authorization (per request) | Corr. & 159 | 125 | CGH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| h. Amendment of Application (per system) | Corr. & 159 | 125 | CGH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| i. Extension of Construction Permit (per system) | 701 | 125 | CGH | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| 9. Space Stations: | | | | |
| a. Application for Authority to Construct: | | | | |
| (i) Domestic | Corr. & 159 | 2,330 | BBY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 2,330 | BBY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| b. Application for Authority to Launch and Operate: | | | | |
| (i) Initial application | | | | |
| (a) Domestic | Corr. & 159 | 80,360 | BNY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (b) International | Corr. & 159 | 80.360 | BNY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| (ii) Replacement satellite | | | | |
| (a) Domestic | Corr. & 159 | 80,360 | BNY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (b) International | Corr. & 159 | 80,360 | BNY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| c. Assignment or Transfer (per satellite): | | | | |

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|---|---|---|---|---|
| (i) Domestic | 702 or 704 | 5,740 | BFY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 702 or 704 | 5,740 | BFY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| d. Modification (per request): | | | | |
| (i) Domestic | Corr. & 159 | 5,740 | BFY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 5,740 | BFY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| e. Special Temporary Authority or Waiver of Prior Construction Authorization (per request): | | | | |
| (i) Domestic | Corr. & 159 | 575 | CRY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 575 | CRY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| f. Amendment of Application: | | | | |
| (i) Domestic | Corr. & 159 | 1,150 | CWY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 1,150 | CWY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| g. Extension of Construction Permit/Launch Authorization (per request): | | | | |
| (i) Domestic | Corr. & 159 | 575 | CRY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 575 | CRY | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| 10. Space Stations (Low Orbit): | | | | |

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|---|---|---|---|---|
| a. Application for Authority to Construct:<br>(i) Domestic | Corr. & 159 | 6,890 | CZW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 6,890 | CZW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| b. Application for Authority to Launch and Operate:<br>(i) Domestic | Corr. & 159 | 241,080 | CLW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 241,080 | CLW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| c. Assignment or Transfer (per satellite):<br>(i) Domestic | 702 or 704 | 6,890 | CZW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | 702 or 704 | 6,890 | CZW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| d. Modification (per request):<br>(i) Domestic | Corr. & 159 | 17,220 | CGW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 17,220 | CGW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| e. Special Temporary Authority or Waiver of Prior Construction Authorization (per request):<br>(i) Domestic | Corr. & 159 | 1,725 | CXW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |

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| (ii) International | Corr. & 159 | 1,725 | CXW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| f. Amendment of Application: | | | | |
| (i) Domestic | Corr. & 159 | 3,445 | CAW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 3,445 | CAW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| g. Extension of Construction Permit/Launch Authorization (per request): | | | | |
| (i) Domestic | Corr. & 159 | 1,725 | CXW | Federal Communications Commission, Satellite and Radiocommunication Div'n, P.O. Box 358160, Pittsburgh, PA 15251-5160. |
| (ii) International | Corr. & 159 | 1,725 | CXW | Federal Communications Commission, Satellite and Radiocommuhication Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| 11. Section 214 Cable Construction: | | | | |
| a. Overseas Cable Construction | Corr. & 159 | 10,480 | BIT | Federal Communications Commission, IB Telecommunications Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| b. Cable Landing License: | | | | |
| (i) Common carrier | Corr. & 159 | 1,180 | CXT | Federal Communications Commission, IB Telecommunications Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| (ii) Replacement satellite | Corr. & 159 | 11,655 | BJT | Federal Communications Commission, IB Telecommunications Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| c. All Other International Applications Under Section 214 | Corr. & 159 | 705 | CUT | Federal Communications Commission, IB Telecommunications Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| d. Special Temporary Authority (all international services) | Corr. & 159 | 705 | CUT | Federal Communications Commission, IB Telecommunications Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| e. Assignments or Transfers (all international services) | Corr. & 159 | 705 | CUT | Federal Communications Commission, IB Telecommunications Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |
| 12. Recognized Private Operating Status (per application) | Corr. & 159 | 705 | CUT | Federal Communications Commission, IB Telecommunications Div'n, P.O. Box 358115, Pittsburgh, PA 15251-5115. |

42. Section 1.1153 is amended by deleting "International (HF) Broadcast" from the list of services and deleting the corresponding fee and address information from the table appearing in that section.

43. Section 1.1154 is amended by deleting the existing fee schedule appearing therein and inserting in its place the following:

| Services | Fee Amount | Address |
|---|---|---|
| Radio Facilities: | | |
| 1. Cellular Radio (per 1,000 subscribers). | $60 | FCC, Cellular, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 2. Personal Communications. | 60 | FCC, Cellular, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 3. Public Mobile (per 1,000 subscribers). | 60 | FCC, Cellular, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 4. Domestic Public Fixed | 55 | FCC, Cellular, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| Carriers: | | |
| 1. Inter-Exchange Carrier (per 1,000 presubscribed lines). | 60 | FCC, Carriers, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 2. Local Exchange Carrier (per 1,000 access lines). | 60 | FCC, Carriers, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 3. Competitive Access Provider (per 1,000 subscribers). | 60 | FCC, Carriers, P.O. Box 358835, Pittsburgh, PA 15251-5835. |

44. Subpart G of Part 1 is further amended by redesignating existing sections 1.1156 through 1.1166 as new sections 1.1158 through 1.1168.

45. Subpart G of Part 1 is further amended by adding a new section 1.1156, reading as follows:

**§ 1.1156 Schedule of regulatory fees and filing locations for international and satellite services.**

| Services | Fee Amount | Address |
|---|---|---|
| Radio Facilities: | | |
| 1. Space Stations (geostationary orbit) | $65,000 | FCC, Satellite and Radiocommunication Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 2. Space Stations (low earth orbit) | 90,000 | FCC, Satellite and Radiocommunication Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 3. International Public Fixed | 110 | FCC, Satellite and Radiocommunication Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| Earth Stations: | | |
| 1. VSAT and Equivalent C-Band antennas (per 100 antennas) | 6 | FCC, Satellite and Radiocommunication Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 2. Mobile Satellite Earth Stations (per 100 antennas) | 6 | FCC, Satellite and Radiocommunication Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 3. Less than Nine Meters (per 100 antennas) | 6 | FCC, Satellite and Radiocommunication Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| 4. Nine Meters or More | | |
| a. Transmit/Receive and Transmit Only (per meter) | 85 | FCC, Satellite and Radiocommunication Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| b. Receive Only (per meter) | 55 | FCC, Satellite and Radiocommunication Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| Carriers: | | |
| 1. International Circuits (per 100 active 64 KB circuits or equivalent) | 220 | FCC, IB Telecommunications Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |
| International (HF) Broadcast | 200 | FCC, Planning and Negotiations Div'n, P.O. Box 358835, Pittsburgh, PA 15251-5835. |

## PART 25: SATELLITE COMMUNICATIONS

46. Section 25.110 is amended by deleting existing paragraph (b) and inserting in its place the following:

(b) Applications for satellite radio station authorizations governed by this part and requiring a fee shall be mailed or hand-delivered to the location specified in Part 1, Subpart G of this title. All other applications shall be submitted to the Secretary, 1919 M Street NW, Washington, DC 20554, and addressed to the attention of Chief, Satellite and Spectrum Management Division.

**PART 43: REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES**

47. Section 43.61 is amended by revising paragraph (d) to read as follows:

(d) The information required under this section shall be furnished in conformance with the instructions and reporting requirements prepared under the direction of the Chief, Common Carrier Bureau, prepared and published as a manual, in consultation and coordination with the Chief, International Bureau.

48. Section 43.81 is amended by deleting the words "Common Carrier Bureau" from paragraph (b) and inserting in their place the following: "International Bureau"

**PART 64: MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

49. Section 64.1001 is amended by deleting "Common Carrier Bureau" both times it appears in subparagraph (*l*)(2), and replacing that phrase both times with "International Bureau".

**PART 73: RADIO BROADCAST SERVICES**

50. Section 73.1650 is amended by penultimate sentence and inserting in its place the following:

The documents listed in this paragraph are available for inspection in the office of the Chief, Planning and Negotiations Division, International Bureau, FCC, Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

# FACT SHEET

November 1994

## Consumer Alert: "Telephone Slamming"

The Federal Communications Commission is alerting telephone customers to an unfair practice known as "telephone slamming." "Telephone slamming" occurs when a customer's long distance carrier (the company that charges the customer for their long distance phone calls) is switched without their consent. Customers have the right to use any long distance carrier they choose and to change carriers whenever they want. Sometimes, however, a long distance carrier may engage in misleading sales tactics with the aim of inducing customers to unknowingly switch to its service. Often non-English speaking customers are targeted. It is important for customers to select their own long distance carrier because different carriers charge different rates.

Here are some ways that customers unknowingly switch their carrier:

### Contests

At a mall or festival, there is a booth where people can enter a contest to win a car or trip. On the entry form, the information about the contest is in big, bold print. A consumer signs the entry form. A few weeks later, the consumer receives her telephone bill and notices that she has a new long distance carrier that she did not request. She contacts the company and they say that they have her signature indicating consent on an entry form. Although she thought that she was just entering a contest, the form contained information in small print about switching long distance carriers.

### Checks Mailed to Individuals

A consumer receives a check in the mail from a long distance carrier. He signs and deposits the check without reading the small print on it. The print says that if you cash the check you are agreeing to switch your long distance carrier.

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**Office of Public Affairs, Public Service Division, 1919 M Street NW, Washington, D.C., 20554**
**202-418-0200/TT 202-418-2555**

FCC 94-273

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of Parts 2 and 15 | ) | |
| of the Commission's Rules to Permit | ) | ET Docket No. 94-124 |
| Use of Radio Frequencies Above 40 GHz | ) | RM-8308 |
| for New Radio Applications | ) | |

## NOTICE OF PROPOSED RULE MAKING

Adopted: October 20, 1994 ; Released: November 8, 1994

**Comment Date:** January 30 , 1995
**Reply Comment Date:** March 1, 1995
By the Commission:

## INTRODUCTION

1. By this action, the Commission proposes to open for commercial development and use a portion of the "millimeter wave" frequency bands above 40 GHz.[1] To date, millimeter wave technology has been limited to military and scientific applications. The proposals set forth herein will encourage use of this technology in commercial products and services.

2. In particular, the Commission proposes to make available a total of 16 GHz of spectrum in the frequency range between 47.2 and 153 GHz on a shared basis with existing and future government users. The Commission also proposes to make available 2 GHz of spectrum in the 40.5-42.5 GHz band for non-government users for a total of 18 GHz. These new frequency bands will permit the development of short-range wireless radio systems with communications capacities approaching that now achievable only with coaxial and optical fiber cable. Such systems could support many short-range applications that require very high bandwidth or data transfer rates. Uses could include applications involving the National Information Infrastructure (NII); educational or medical applications such as remote wireless access to libraries or other informational databases; and non-communications uses such as automobile radar systems to avoid collisions. The proposed rules provide for the operation of such systems on both a licensed and an unlicensed basis. The Commission is also proposing

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[1] The term millimeter wave frequency bands is take from the fact that the wavelength of radio signals on frequencies between 30 GHz and 300 GHz ranges between 1 and 10 millimeters.

technical standards for millimeter wave band equipment and operation.

3. The Commission believes that the proposals set forth herein will provide the American public with access to new products and communications services; provide new opportunities for American business and industry; and, promote new jobs and economic growth in the United States.

## BACKGROUND

4. The radio spectrum above 40 GHz is generally unused at the present time[2] and until recently the technology to operate in this portion of the spectrum has been prohibitively expensive. In recent years, however, the U.S. Government has funded projects in millimeter wave technology for a number of military and scientific applications.[3] For example, such technology is used for guidance systems on "smart" munitions, for advanced radar systems, and for remote sensing applications. Given these advances, it now appears that millimeter wave technology can be used for more general radio communications applications.

5. Interest has also been shown in developing millimeter wave technology for vehicular radar systems. In this regard, we have received a petition for rule making from General Motors Research Corporation (GM) requesting that we permit the use of automotive radar systems in the 76-77 GHz band.[4] In its petition, GM indicates that its radar system would alert a driver to potentially hazardous situations in the path of the vehicle. It states that its proposed product would not cause harmful interference to existing or future communications users and would have a low susceptibility to receiving interference due to the type of modulation employed, the use of low transmit power and the use of a narrow beam antenna.[5]

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[2] While the Commission has allocated spectrum up to 275 GHz, it has not previously adopted service rules to permit general use of millimeter wave spectrum above 40 GHz. See 47 CFR Section 2.106.

[3] The U.S. Department of Defense's Advanced Research Projects Agency (ARPA) has invested over $550 million in the Monolithic Microwave Integrated Circuit Program (MIMIC) in order to decrease the production cost of this technology.

[4] See Petition for Rule Making filed by General Motors Research Corporation (RM-8308) on July 13, 1993.

[5] The frequency band 76-81 GHz is allocated primarily for radiolocation services. It is also allocated to the Amateur Radio Service on a secondary basis. See 47 CFR Section 2.106. GM states that, based upon discussions with a representative of the American Radio Relay League, this band is not currently used by amateur operators. GM indicates that only two operators currently use the 76-81 GHz band: an antenna test range used by the Georgia Institute of Technology, and a U.S. Government system, operated by Bell Labs in New York

GM also indicates that the 76-77 GHz band has been proposed for radar and future road guidance systems within Europe. GM states that allocation of the same spectrum in the U.S. would enable it to produce a single product for both the U.S. and Europe, permitting GM and other U.S. auto makers to control costs and enhance productivity.

6. Ford Motor Company (Ford), Chrysler Corporation (Chrysler), VORAD Safety Systems, Inc. (VORAD) and the American Automobile Manufacturers Association (AAMA) submitted comments responding to GM's petition. These parties request that we expand GM's proposal to include other frequency bands. For example, AAMA, which is composed of Ford, Chrysler and GM, indicates that its members desire to use spectrum in the bands 24.75-25.25 GHz, 37.5-38.5 GHz, 76-77 GHz, 92-95 GHz, 139-141 GHz and 152-154 GHz. VORAD requests that we allow operation of vehicular radar transmitters in 200 MHz of spectrum somewhere within the 46-50 GHz band. Reply comments supporting the positions of the commenting parties were filed by GM, VORAD, AAMA and Rockwell International Corporation (Rockwell).[6]

## DISCUSSION

7. The millimeter wave region of the spectrum is a major resource that is essentially undeveloped and is unavailable today for commercial use. It has been our experience that opening regions of the spectrum to commercial applications and technologies fosters the development and growth of new industries and jobs. For example, opening spectrum in the 2 GHz range for commercial development on both a licensed and unlicensed basis for personal communications services (PCS) has stimulated investment and technological development in that spectrum that promise to bring tremendous benefits to consumers and the economy in the form of new communications services, lower costs and a more competitive industry.[7] Opening certain unlicensed bands to spread spectrum technology only a few years ago has similarly stimulated rapid commercial development of that technology so that today millions of spread spectrum devices are used by numerous businesses and other users for such diverse applications as remote meter reading, utility load management, voice-secure cordless

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and New Jersey for research.

[6] While we are including GM's petition and the comments filed thereon in this general proceeding on use of the millimeter wave spectrum, we may later choose to act on these issues separately if doing so would expedite the implementation of vehicular radar systems.

[7] See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993), Memorandum Opinion and Order, 9 FCC Rcd 5947 (1994)

telephones, and radio local area networks.[8] We believe that opening portions of the millimeter wave spectrum will similarly stimulate new applications of radio technology for the American public, facilitate technology transfer from the military sector, and create opportunities for economic growth and jobs. This action will also promote United States competitiveness internationally by enabling development of technology for potential use in other parts of the world.[9]

8. The propagation of millimeter wave radio signals is more limited than that of radio signals at lower frequencies. Signals in the millimeter wave bands are significantly affected by the presence of oxygen and water vapor within the atmosphere. Absorption and scattering caused by oxygen and water vapor limit the range of millimeter wave transmissions to a few kilometers almost regardless of the power used.[10] While the limited range of such transmissions might appear to be a major disadvantage, the ability to reuse frequencies within very short distances will allow a higher concentration of transmitters to be located in a geographical area than is possible with lower-frequency transmitters.[11] In addition, the wide bandwidth that is possible in the millimeter wave spectrum can support the operation of

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[8] See First Report and Order in GEN Docket No. 81-413, 101 FCC 2d 419 (1985), adopting rules in Part 15 for low power spread spectrum devices. The Part 15 spread spectrum rules were recodified and clarified in the First Report and Order in GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989). See also Report and Order in GEN Docket No. 89-354, 5 FCC Rcd 4123 (1990), amending Parts 2 and 15 of the rules with regard to operation of spread spectrum systems. See 47 CFR Section 15.247.

[9] We note that other parts of the world, such as Europe and Japan, are also considering commercial uses of millimeter wave technology.

[10] The amount of signal attenuation due to absorption and scattering varies with frequency and other factors. Attenuation caused by oxygen is significant throughout the millimeter wave spectrum, but increases dramatically at frequencies around 60 GHz and 120 GHz. Attenuation caused by water vapor varies based on temperature and relative humidity, but generally increases with frequency. Rain, snow, hail, and fog can all affect the range of millimeter wave transmissions. For a more detailed discussion of atmospheric attenuation in the millimeter wave spectrum, see ITU CCIR Report 719-3.

[11] See The Use of the Radio Frequency Spectrum Above 30 GHz: A Consultative Document, Department of Trade and Industry, Radiocommunications Division, London, September 1988. This document quantifies the relationship of frequency reuse to useful communications working range for various frequencies. In the millimeter wave spectrum, especially near 60 GHz, there is a tremendous frequency reuse potential which differs dramatically from lower bands.

wireless communications links with capacity approaching that of coaxial cable and fiber-optic systems.[12]

9. Millimeter wave spectrum is suitable for many types of short-range communications systems. The large amount of spectrum available at these frequencies can accommodate the wide channel bandwidth that is needed for rapid transmission of large volumes of data. For example, millimeter wave technology applications could include transmission of high resolution video images, access to large data bases, and communication system backbones. Such systems could also provide short-range wireless access to the NII with wider bandwidth, and therefore greater capacity, than is available from systems operating in lower frequency bands. While spectrum to accommodate wide bandwidth applications is becoming scarce below 40 GHz, the millimeter wave region of the spectrum is largely unused and can accommodate those bandwidths. In addition, as indicated by GM and other automotive vehicle manufacturers, these frequencies can be used for many types of vehicular applications, such as collision avoidance radars and highway guidance systems.

10. Section 303(g) of the Communications Act (Act) directs the Commission to "generally encourage the larger and more effective use of radio in the public interest."[13] In addition, Section 7 of the Act states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public."[14] One of the ways we accomplish these statutory goals is to continually seek opportunities to encourage new product development in the telecommunications industry. New products result in economic development and job growth in the United States, and provide the American public with access to new and innovative communications technologies. The proposals set forth herein are intended to further these goals.

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[12] Bandwidth limitations, modulation techniques used, and signal-to-noise ratios restrict the ability of existing radio communications systems to transmit data at high rates. For example, early Personal Communications Service (PCS) systems are expected to accommodate data rates of approximately 64,000 bits/second, although PCS systems may ultimately be able to support data rates of 1,000,000 bits/second (1 Megabit/second) or more by using different modulation or channeling schemes. Today's optical fiber cable systems are capable of carrying data at rates of 1,000 Megabits/second or more. Because of the large amount of bandwidth available in the millimeter wave spectrum, transmission of data rates ranging from 50 Megabits/second up to 5,000 Megabits/second, or more, are possible depending upon the frequency band.

[13] See 47 U.S.C. Section 303(g).

[14] See 47 U.S.C. Section 157.

Proposed Frequency Bands

11. We are proposing to open a total of 18 GHz of spectrum between 40.5 and 153 GHz for commercial development. All of the spectrum above 40 GHz, with the exception of the 40.5-42.5 GHz band, several Amateur Radio Service allocations, and a Government satellite allocation[15], is allocated on a shared basis to government and non-government use, and most of the bands we are proposing to open for commercial use will continue to be available for existing and future government use. Thus, in cooperation with the Department of Commerce's National Telecommunications Information Administration (NTIA),[16] we are proposing twelve frequency bands in the region of the spectrum from 47 GHz to 153 GHz for potential use by new millimeter wave technologies. These frequency bands are:

47.2 - 48.2 GHz
59.0 - 64.0 GHz
71.0 - 72.0 GHz
76.0 - 77.0 GHz
84.0 - 85.0 GHz
94.7 - 95.7 GHz
103.0 - 104.0 GHz
116.0 - 117.0 GHz
122.0 - 123.0 GHz
126.0 - 127.0 GHz
139.0 - 140.0 GHz
152.0 - 153.0 GHz.

We are also proposing to permit commercial use in the 40.5-42.5 GHz band which is already allocated entirely to non-government use.

12. In developing this proposal, we have attempted to identify frequencies where it is unlikely that interference would occur to government and non-government communications services that already exist or are planned.[17] Further, we have attempted to provide large,

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[15] 43.5 - 45.5 GHz.

[16] NTIA has responsibility for managing use of the radio spectrum by the federal government and its agencies.

[17] In general, we have tried to propose frequency bands that are not currently being used. However, in some cases we have proposed bands in which government or other non-government services may eventually operate. For example, the Federal Aviation Administration is conducting research into new flight safety systems that might operate in millimeter wave spectrum. The National Oceanic and Atmospheric Administration ("NOAA") indicates that it plans to use the 60.4-61.2 GHz band for weather satellites beginning in late 1995. We do not believe that our proposals would preclude these possible future uses or

contiguous blocks of spectrum in order to accommodate the high data rate and wide bandwidth requirements anticipated for millimeter wave operations and technologies. We request comment on our proposed list of bands to be made available for use by millimeter wave technologies. In particular, we invite interested parties to address the suitability of the specific bands identified for use by millimeter wave technologies and, if appropriate, to suggest alternative bands that might be desirable to make available for use at this time.[18] We also invite suggestions for rules that would enhance the use of specific bands for particular services.[19]

13. We are tentatively proposing an approximately even division of available millimeter spectrum between licensed services and unlicensed uses, with unlicensed spectrum further divided between general unlicensed devices and unlicensed vehicular radar systems. We recognize potential benefits in licensing exclusive access to millimeter wave spectrum for the provision of certain kinds of communications services. Certain applications, particularly those covering wide areas or requiring large investment in infrastructure, may not be able to accept the restrictions that accompany unlicensed use or, may require the additional protection from interference that can be afforded under a licensed service. The interference management capability provided by a licensing system would permit higher output power levels and more flexible technical standards than for unlicensed, non-coordinated users. In addition, a significant demand for licensed services on frequencies below 40 GHz[20] indicates that there would be demand for licensed spectrum in nearby millimeter wave regions with similar propagation and technology.

14. In general, unlicensed use may be justified for a limited amount of spectrum because of high transactions cost associated with charging for spectrum used by the envisioned low power devices and the limited interference among users, given restrictions on power and imposition of spectrum sharing etiquettes. That is, some services that would be provided in

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prejudice any future decisions that may be taken with regard to authorizing such services.

[18] With regard to NOAA's plan to use the 60.4-61.2 GHz band, we note that the unique properties of this band will enable satellite sensors looking down into the atmosphere to determine the temperature at different heights above the earth. Parties are requested to provide detailed analysis and comment on whether terrestrial use of the 60.4-61.2 GHz band would interfere with NOAA's planned operations in that band and, in particular, whether this portion of the band should be excluded from the frequency bands that may be authorized for millimeter wave technology under this proceeding.

[19] The specific frequency bands we are proposing, along with their technical standards, may be altered in the final rules based on comments from both government and non-government parties.

[20] For example, many parties have expressed interest in obtaining licenses near 38 GHz in order to provide PCS backhaul services.

unlicensed bands may not be optimally provided in licensed bands because they have the characteristics of a public good. Once the power limits and etiquettes have been set, it may not be efficient for a licensee to charge for entry, because one person's use is not likely to interfere with another person's use. But a licensee would wish to charge for entry to maximize profits. Thus allocating all spectrum to licensed use would result in under-provision of such services. Our experience with the Part 15 spread spectrum rules[21] and with unlicensed 2 GHz PCS has shown us that there is a potentially significant demand for unlicensed devices, some of which involve the application of military technology to novel commercial uses. Restricting power and permitting unlicensed use are not costless, however, since they foreclose uses of that spectrum that require higher power. Ideally, a cost-benefit analysis would be used to determine an efficient allocation of spectrum for such low power devices. A decision to allocate additional spectrum to unlicensed use would require a showing that the value of the increase in net benefits in unlicensed use exceeds the market value of comparable spectrum (i.e., the opportunity cost of the spectrum in licensed use).

15. Although a full cost-benefit analysis may not be feasible, such an analysis would likely conclude that a greater proportion of the millimeter spectrum should be allocated to unlicensed use than has been the norm in lower frequency ranges. In the millimeter spectrum, interference potential and scarcity are less of a concern because the physical characteristics (wide bandwidth and limited range) greatly reduce the potential for interference and the demand is - or at least has been - light. Thus, it would appear that a larger portion of the expected uses of millimeter spectrum (particularly those that can operate satisfactorily with short range, reduced bandwidth and/or highly directional antennas) can coexist on an unlicensed basis without mutually interfering with each other or reducing the amount of spectrum available to each other. For this reason, we are proposing to allocate approximately half of the spectrum available for commercial development for use on an unlicensed basis.

16. At this time, we believe that it is appropriate for vehicular radar systems to operate on an unlicensed basis. It appears that such systems pose little risk of mutual interference in this spectrum due to the low power and directional nature of transmissions. We seek comment on whether we should include the provisions for vehicular radar systems in specific bands allocated exclusively for unlicensed use under Part 15 of our rules. Due to the safety nature of vehicular radar systems and the lack of experience of such systems sharing with totally different technologies, we tentatively find that they should have exclusive bands until we can develop sharing criteria that would allow other users to share these bands.

17. In order to decide which bands should be proposed for each of the three categories described above, we considered the nature of propagation, the proximity to existing bands, and the specific requests we have received for vehicular radars. Thus, we are proposing that the lowest bands, 40.5-42.5 GHz and 47.2-48.2 GHz, be used mostly for licensed applications since they are less than 10 GHz away from an existing band that has similar propagation

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[21] See 47 CFR 15.247.

characteristics and similar equipment technology. However, since we had a request for vehicular radars in this region, 47.2-47.4 GHz be designated for unlicensed vehicular radars. Since 59-64 GHz has the most severe propagation losses we find that there is minimal chance of interference and propose that the whole band be used for unlicensed devices. For the higher frequency bands in which propagation is poor compared to the 47 GHz band but not as limiting as in the 59-64 GHz band, we are proposing a mixture of uses. We propose that some bands be used only for vehicular radars in response to requests we have received. For the remaining bands, we are proposing that each band be evenly split between licensed and unlicensed uses in order to enable both types of applications. These proposals are described in more detail in the following sections. We seek comment on whether this is the appropriate split between licensed and unlicensed uses.

18. General Unlicensed Device Bands. The extremely limited propagation range of the 59-64 GHz band, as well as higher millimeter wave frequency bands, suggests that major portions of those bands be designated for general use by unlicensed devices.[22] Therefore, we are proposing to provide the following frequency bands for unlicensed operations under Part 15 of our rules: 59-64 GHz, 71.5-72.0 GHz, 84.5-85.0 GHz, 103.5-104.0 GHz, 116.5-117.0 GHz, 122.5-123.0 GHz, 126.5-127.0 GHz, and 152.5-153.0 GHz. This would provide 3.5 GHz in seven of the frequency bands and 5 GHz in an eighth band, for a total of 8.5 GHz for general unlicensed operations.

19. Part 15 devices generally operate on a non-interference basis in spectrum assigned for licensed services. However, it is our intention at this time that non-government licensed and unlicensed uses generally not be permitted in the same bands. Given the large number of unlicensed devices that are likely to be operating in these bands, the difficulty of resolving interference problems involving such unlicensed devices, and the current availability of other millimeter wave spectrum, we believe sharing of spectrum by unlicensed and licensed operators would not be workable.

20. Licensed Service Bands. Based on the demand for licensed services below 40 GHz, we are proposing to designate all of the 40.5-42.5 GHz band and virtually all of the 47.2-48.2 GHz band for licensed use (except for a small portion that would be designated for vehicular radar use, as indicated below). Similarly, we are proposing that portions of the bands above 64 GHz that are not designated for vehicular radar use be designated for licensed use.[23] In particular, we are proposing to provide spectrum for licensed services in each of the

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[22] See note 9.

[23] We are not proposing any licensed use in the 59-64 GHz band because its propagation range is extremely limited.

following bands: 40.5-42.5 GHz[24], 47.4-48.2 GHz, 71.0-71.5 GHz, 84.0-84.5 GHz, 103.0-103.5 GHz, 116.0-116.5 GHz, 122.0-122.5 GHz, 126.0-126.5 GHz and 152.0-152.5 GHz. Comments are requested on whether the proposed total of 6.3 GHz of spectrum for licensed operations will be sufficient to meet the needs of those operations where licensing is appropriate.

21. Despite range limitations and the current high cost of technology, there may be many potentially valuable uses of licensed spectrum above 40 GHz. The current allocations for these bands in the ITU and the U.S. domestic allocation tables include a wide diversity of terrestrial and satellite services of a fixed, mobile or broadcasting nature. Furthermore, the 1992 World Administrative Radio Conference (WARC-92) adopted several changes to the International Table of Frequency Allocations that may need to be reflected in changes to our Table of Frequency Allocations, contained in Section 2.106 of our rules. In particular, Space Research (space-to-earth) use was added as a secondary allocation for the 76-81 GHz band. We are proposing to adopt this WARC-92 related allocation change in this proceeding.[25] At present, there is little information as to which of these potential services represent the highest valued use of this spectrum. We therefore propose to retain the full range of services presently allowed under the allocation table; in other words, any of the services currently listed in the allocation table will be permissible. For convenience, we will refer to these uses collectively as "Licensed Millimeter Wave Service", or LMWS. We propose to incorporate this service into Part 21 of our rules.

22. While we are retaining the broad flexibility in the current allocation table, we must also prescribe rules for the licensing of this spectrum. Normally, licensing issues are determined in the context of a specific service. However, because of the wide range of services that we propose to permit in this spectrum, a different approach is required. In this case, we will define licensing rules based on our best judgement of what the dominant use of this spectrum is likely to be rather than designing them around a prescribed use. We believe that in this instance precision is less important because of the broad degree of flexibility that is being provided and the ability of the market to adjust. The important objective is to open this spectrum for commercial development and to eliminate the current regulatory barriers and uncertainties that now prevent this spectrum from being used.

23. We believe that many of the uses of millimeter spectrum are likely to be technically and operationally similar to those contemplated in the 28 GHz band for the Local Multipoint

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[24] This band is subject to footnote US211 in our Table of Allocations, 47 C.F.R. 2.106, which deals with protecting radio astronomy users in adjacent bands. We are excluding air-to-ground uses from the present proposals as it may be impractical to protect these users. Any space-to-earth use would have to demonstrate protection of radio astronomy users.

[25] In addition, the 84-86 GHz band is allocated on a world-wide basis for broadcasting and satellite broadcasting, although the U.S. has not yet implemented this allocation domestically.

Distribution Service (LMDS), e.g., fixed point-to-point and point-to-multipoint services for video, voice and data transmission to subscribers throughout an area. We therefore propose to model our licensing rules for the millimeter bands after the rules and procedures proposed for LMDS.[26] Comments are invited as to any modifications to the proposed LMDS rules that may be appropriate in the licensing of millimeter spectrum. In the 28 GHz band, we proposed to divide the available spectrum (in that case a total of 2 GHz) into two license blocks of 1000 MHz for exclusive assignment in each area. We propose a similar division of spectrum in the millimeter bands. Thus, for example, the 47.4-48.2 GHz licensed band would be divided into two 400 MHz contiguous blocks. Comments are requested on whether this is an appropriate division of spectrum in these bands and on whether the licensed blocks should be contiguous or further subdivided into paired blocks to facilitate duplex (two-way) transmission.

24. In the 28 GHz band, we proposed to use Rand McNally "Basic Trading Areas" as the service areas for LMDS licenses.[27] However, in that proceeding, the particular type of service was more narrowly prescribed and specific technologies had been proposed which suggested BTA service areas. In the millimeter wave bands, however, we are proposing to allow a much broader range of uses and technologies, some of which may require larger service areas. Also, larger service areas will facilitate the setting of technical standards, reduce coordination requirements between adjoining licensees, and produce larger economies of scale, which could be especially important during the initiation of new services. For these reasons, we are proposing to use Rand McNally Major Trading Areas (MTAs) in the licensing of LMWS rather than the BTAs used in the 28 GHz band.[28] We also propose, as we did in the 28 GHz

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[26] See, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, CC Docket No. 92-297, 8 FCC Rcd 557 (1993). We are not including in Appendix B specific proposed Part 21 rules for the Licensed Millimeter Wave Service since we are proposing that those rules be very similar to the rules proposed in the LMDS proceeding.

[27] id, at para. 30.

[28] Major Trading Areas (MTAs) are defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, pages 36-39. There are 47 MTAs as defined by Rand McNally. As we have done in other services in which we have used MTA license areas, we propose to separate Alaska from the Seattle MTA and license it as a separate MTA-like area. We also propose to separately license the following three additional MTA-like areas: (1) Guam and the Northern Mariana Islands; (2) Puerto Rico and the United States Virgin Islands; and (3) American Samoa. Thus we will license a total of 51 MTA or MTA-like areas on each spectrum block. We note that Rand McNally & Company owns the copyright to MTA/BTA Listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally's Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally's Commercial Atlas & Marketing Guide. Rand McNally has licensed the use of its

band, to limit each LMWS licensee to a single spectrum block in each band in the same area. Thus, a given entity would be allowed to own one LMWS license in each band in the same area but would not be permitted to own both licenses in the same band in any area.

25. In the 28 GHz proceeding, we proposed a number of regulations (e.g., mandatory buildout requirements, financial qualifications and transfer restrictions) aimed at deterring speculation, on the assumption that lotteries would be used as the licensing procedure. However, we propose to use auctions to award LMWS licenses, and thus licensees would have much less incentive to engage in uneconomic warehousing or other forms of speculation. We tentatively conclude that mandatory buildout requirements and transfer restrictions for LMWS would reduce licensee flexibility and reduce the ability of licensees to put this spectrum to its highest valued use. We also tentatively conclude that the use of auctions to award LMWS licenses will ensure that applicants are financially qualified. Thus, we do not propose to adopt additional financial qualifications for LMWS applicants. We seek comment on these tentative conclusions. In the LMDS proceeding, we proposed a five- year license term. However, in the millimeter spectrum, development and implementation times are likely to be significantly longer than at 28 GHz. Thus, to encourage the longer term investment that will be required to develop and market commercial applications in the millimeter spectrum, we propose a ten-year license term. We also propose to adopt renewal expectancy rules for LMWS licenses and request comment on the details of such rules.

26. Section 309(j)(1) of the Communications Act, as amended, 47 U.S.C. § 309(j)(1), permits auctions only where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals. We conclude that the principal use of millimeter wave spectrum as licensed in the manner we are proposing is likely to be of a commercial nature and involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals and would thus meet the statutory requirements for the use of auctions. We also conclude that the use of competitive bidding in licensing millimeter spectrum will serve the public interest by recovering for the public a portion of the value of the spectrum, as envisioned in Section 309(j)(3)(C), id, and by awarding licenses to those who value them the most and thus are most likely to introduce service most rapidly to the public. Thus, we propose to use auctions to award LMWS licenses in the case of mutually exclusive applications. Comments are requested on these conclusions and on any special provisions that may be needed to meet the objectives of Section 309(j)(3)(B), id, of "promoting economic opportunity" and "avoiding excessive

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copyrighted MTA/BTA Listings and maps for certain services such as PCS and 800 MHz SMR. At present, however, services in millimeter wave spectrum above 40 GHz are not covered by this agreement. We encourage interested parties and Rand McNally to explore the extension of the current agreement to cover the proposed LMWS as well.

concentration of licenses" by disseminating licenses "among a wide variety of applicants." In the Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2348 (released April 20, 1994), (Second Report and Order), we adopted rules which provide the Commission with a menu of options to choose to promote these objectives with respect to particular spectrum serves to be auctioned.

27. In the Second Report and Order, id, we also adopted criteria that we would use in determining the method of auction in particular services. Based on these criteria, we propose that LMWS licenses be auctioned using a simultaneous multiple round bidding procedure. The use of this method is indicated where the expected value of licenses is high compared to the cost of conducting the auction and the values of licenses are interdependent. See Second Report and Order at ¶ 177. We believe these licenses will be highly valued because of the wide range of services and technologies that are permitted and because of indications of high demand for spectrum in the 28 GHz band, which has similar technical and operational characteristics to millimeter bands. We also conclude that LMWS licenses in one area are likely to be of greater value when combined with licenses in other areas and are therefore interdependent. Also, because of technical and operational similarities across the several bands to be licensed, licenses in one band may be close substitutes for those in other bands, thus indicating the need for a simultaneous auction. Comments are requested on these conclusions.

28. We seek to ensure that spectrum is used in the way that brings most value to the public. Therefore, we invite response to several questions we have about area-wide licensing and the use of competitive bidding. First, is there a significant commercial or other interest in obtaining exclusive, area-wide use of millimeter wave spectrum? If so, what size spectrum blocks and licensing areas should be used? Second, should the spectrum be free of U.S. government operations or the requirement for coordination with the Government in order for commercial use thereof to be viable? As mentioned previously, the millimeter wave spectrum is currently shared between U.S. government and non-government users. It would take additional time for us to negotiate such non-government exclusivity with NTIA, potentially resulting in a significant delay in the implementation of millimeter wave technology.[29]

29. Unlicensed Vehicular Radar System Bands. As noted previously, the automobile industry is actively developing vehicular radar systems for use in various millimeter wave bands. We note that such technology is envisioned as a key feature of the Intelligent Vehicle Highway System, which is intended to offer significant benefits to the American public by

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[29] We are proposing to require that all non-government uses of shared millimeter wave frequency bands be coordinated with NTIA unless we are able to negotiate non-government exclusivity. Information on U.S. Government assignments would be made available to the public except when necessary to meet national security concerns. Comments are invited regarding the information that non-government licensees may need on existing or planned government operations to affect coordination.

improving highway safety. In view of the promise and importance of this technology, and its intended use for public safety purposes, we believe it merits special consideration. We tentatively conclude that it is appropriate to take steps to minimize the likelihood of interference to such systems, notwithstanding the assertions of the automobile manufacturers that this technology would have a low susceptibility to receiving interference. Accordingly, we are proposing to designate three of the twelve millimeter wave bands, as well as part of a fourth band, for use by vehicular radar systems and we are not proposing any other new uses for them at this time. These bands are: 47.2-47.4 GHz, 76.0-77.0 GHz[30], 94.7-95.7 GHz, and 139.0-140.0 GHz. This would provide 3.2 GHz of spectrum for vehicular radar systems.

30. In developing this proposal we have attempted to satisfy the automobile manufacturers' requests for spectrum for vehicular radar systems. Three of the bands we are proposing for vehicular radar systems are within the bands suggested by the automobile manufacturers. We are also proposing 200 MHz of spectrum in the 46-50 GHz band, as requested by VORAD. With regard to the 37.5-38.5 GHz band, we note that parties seeking to future provide PCS services are planning to use this band to connect PCS base stations.[31] We believe that new users operating in the 37.5-38.5 GHz band could cause interference to future PCS operations, and thus have not proposed use of this band for vehicular radar systems. We have not proposed to allow operation in the 24.75-25.25 GHz band because of possible interference to aviation radionavigation systems operating under Part 87 of our rules. We also have not proposed to allow unlicensed operation in the 92.0-94.7 GHz band due to concerns expressed by NTIA about possible interference to government operations. However, we are proposing to allow vehicular radar systems in the nearby 94.7-95.7 GHz band. With regard to AAMA's request for spectrum in the region of 152-154 GHz, we have elected to instead make spectrum available in this region for licensed fixed services and unlicensed devices. The information received to date from the vehicular radar proponents has contained few details on the justification for the amount of bandwidth required in each band and how the bandwidth affects equipment cost and performance. While we do not want to prejudge which bands might ultimately be most effective for various vehicular radar applications, we are also concerned about the number of bands which have been proposed. More specific information on the number of bands needed and the amount of spectrum required in each band would be very helpful in our deliberations on these questions.

Alternative Approaches

31. Although we are proposing one approach for dividing the millimeter wave frequency bands between licensed services, general unlicensed devices, and vehicular radar systems, we

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[30] This band is also allocated to the Amateur Radio Service and is available for use under Part 97 of our Rules. This allocation and its service rules are not affected by this proceeding.

[31] See Second Report and Order, GEN Docket 90-314, 8 FCC Rcd 7700 at 7741, para. 95 (1993).

invite discussion on alternative approaches. For example, could (or should) unlicensed devices and licensed services be permitted to operate in the same frequency bands? Could vehicular radar systems operate safely (i.e., without causing or receiving harmful interference) in frequency bands that also are assigned for other unlicensed devices or for licensed use? If not, are there any compatible highway information or safety services that could operate safely in the bands set aside for vehicular radar systems? Should we change the proportion of spectrum for unlicensed devices, licensed services, and vehicular radar systems? The final rules that are adopted in this proceeding may change significantly from those proposed herein based on the comments and recommendations that are received.

32. The spectrum involved in this proposal, except for the 40.5-42.5 GHz band, is all shared with government users at this time. The LMWS concept outlined above would either involve government users sharing the same spectrum as the licensee[32] or require coordinating each LMWS license before issuance with NTIA. We request comment on the feasibility of these two possible approaches or alternatives to them. If neither of these approaches are possible we may have to request that NTIA agree to an exclusive non government allocation in the licensed bands or use a more traditional approach of licensing individual systems on a first-come-first-served basis, e.g., as we now do for point-to-point systems under Parts 21, 74, 78 and 94 of our Rules, rather than issuing flexible, wide area licenses. We request comments on these alternatives.

Proposed Technical Standards and Equipment Authorization Requirements

33. Licensed Services. Consistent with our assessment that the millimeter wave bands offer the potential to support a large variety of new radio technologies and services, we are proposing to allow licensees broad flexibility to choose the technologies and bandwidth of fixed applications that they operate in these bands, subject only to technical rules intended to minimize interference to other licensed users of these bands. In particular, we are proposing to limit the power of licensed transmitters in the proposed frequency bands to 16 dBW equivalent isotropically radiated power (EIRP). This is based on: 1) an assumed limit of -20 dBW of transmitter power, which is likely to be typical of commercially-affordable microwave integrated circuits in the near future; and, 2) an antenna gain of 36 dB, which we believe will be typical of economical antennas and transmission systems in the near future. We propose to permit either direct EIRP measurements or indirect calculations based on transmitter power and antenna gain measurements. Because of the broad flexibility we are proposing in the use of licensed bands, we will consider higher power limits on a case-by-case basis subject to coordination with affected licensees. Comments are requested on the need for field strength limits at the boundaries of licensed service areas and on the need for rules requiring interference coordination between licensees in adjoining service areas.

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[32] Thus both the Government and the licensee could expand their existing systems or add new systems within the service area. Each new Government or licensed transmitter would be prohibited from interfering with previously-authorized and installed uses.

34. We are proposing the same spurious emissions and frequency stability requirements for licensed devices as unlicensed devices. For licensed devices, these limits would apply to emissions outside the assigned spectrum block in which the transmitter is operating. We invite comment as to whether licensed devices should be subject to somewhat different requirements. For example, we note that the spurious emission standard may be more difficult to meet for licensed equipment due to the higher power permitted for the transmitter. With regard to frequency stability, we note that we normally require compliance over a temperature range of -20 to +50 degrees Celsius for products operating under Part 15 and -30 to +50 degrees Celsius for products operating under many licensed services. We invite comment as to whether it is appropriate to establish different temperature range requirements for frequency stability for unlicensed and licensed equipment. We also request comments as to whether susceptibility standards may be appropriate or necessary for licensed equipment.

35. We are proposing that transmitters operating in the licensed millimeter wave bands be subject to type acceptance by the Commission prior to marketing. The type acceptance procedure, which is generally similar to the certification procedure used with unlicensed devices, is described in 47 CFR Section 2.981, et seq. It requires that tests be performed to measure the levels of radio frequency (RF) energy that are radiated by the device into the open air or conducted by the device onto the power lines. After these tests have been performed, a report must be produced showing the test procedure, the test results, and some additional information about the device including design drawings.

36. Our rules do not provide any relevant guidance on type acceptance measurement procedures for the millimeter wave spectrum. Nor are we aware of any measurement procedures developed in the private sector that may be appropriate. Accordingly, we are proposing only that measurements for type acceptance purposes be in accordance with good engineering practice. We are, however, generally proposing the same requirements on measurement frequency range and instrumentation as we are proposing for unlicensed devices. We invite comment on this proposal and alternatives.

37. We are considering in a separate proceeding the appropriate RF safety exposure standard for radio transmissions, including millimeter wave band operations, to be incorporated into our rules.[33] It is our intention to ultimately adopt millimeter wave band

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[33] See Notice of Proposed Rule Making, ET Docket No. 93-62, 8 FCC Rcd 2849 (1993). Our current rules specify the use of the American National Standard ANSI C95.1-1982, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" for evaluating the environmental effects of RF radiation. See 47 CFR Section 1.1301, et seq. The Notice of Proposed Rule Making proposes to use a newly-developed standard, IEEE C95.1-1991 (ANSI/IEEE C95.1-1992), "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz." For frequencies above 15 GHz, ANSI C95.1-1982 is generally more restrictive than IEEE C95.1-1991. We are proposing to defer any decisions about relevant RF safety exposure

rules that will ensure millimeter wave equipment meets the relevant RF exposure standards. Since we are limiting our proposal for licensed operation to fixed services, we believe it is appropriate to apply the relevant RF exposure standards for controlled environments.[34]

38. Unlicensed Devices. We are proposing Part 15 rules that would allow the use of millimeter wave technology for virtually any short-range communications application, with only minimal technical restrictions intended to minimize interference and to avoid potential safety concerns. Specifically, we propose to limit the peak power density of unlicensed Part 15 millimeter wave transmitters, except those used in vehicular radar systems, to 200 nanowatts/square centimeter at a distance of 3 meters from the antenna.[35] We believe that this limit will accommodate the needs of low-power, unlicensed users. It will also help ensure that unlicensed millimeter wave devices, which could be located virtually anywhere at distances potentially very close to users, comply with the relevant RF safety standards.

39. As noted above, we currently have a proceeding pending to consider new standards for RF exposure from radio frequency equipment. The power levels we have proposed for unlicensed millimeter wave transmitters comply with the IEEE C95.1-1991 standard for uncontrolled environments at distances in excess of 2 cm from the antenna. However, we note that comments filed in ET Docket No. 93-62 suggest that a more stringent RF exposure guideline may be appropriate.

40. We invite comment on whether our proposed power limit is appropriate and whether we should require compliance with the IEEE standard at a distance other than 2 cm from the antenna.[36] In addition, we request comments on alternative approaches that could be implemented to assure that Part 15 millimeter wave technology devices are used safely. One approach could be to permit the approval of devices with higher power levels provided they have design features that preclude excessive human exposure to RF signals.[37]

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standards pending completion of that proceeding. However, should this proceeding be completed prior to completion of ET Docket No. 93-62, any millimeter wave band rules that do not conform with the new RF exposure guidelines would be modified accordingly.

[34] See Notice of Proposed Rule Making, ET Docket No. 93-62, supra, at 12, for discussion about the definition of a controlled environment.

[35] This is comparable to 0.25 watts EIRP.

[36] The power of unlicensed millimeter wave devices could be increased if we permitted compliance with the IEEE standard at a greater distance.

[37] Such design features could include circuitry to automatically turn off the transmitter if a person comes too near to the antenna, or physical protective enclosures to keep people at least a certain distance from the antenna.

41. In order to protect other radio services from harmful interference, we propose to limit spurious emissions from unlicensed transmitters operating above 40 GHz to 2 picowatts/square centimeter measured 3 meters from the radiating source. This limit would apply to emissions outside the allocated band in which the transmitter is operating. With regard to frequency stability, we propose to require that fundamental emissions remain confined within the operating band under all conditions of operation, including changes due to frequency tolerance of the stabilizing circuitry and frequency drift over the product's operating temperature range. The temperature range over which compliance must be maintained would be -20 to +50 degrees Celsius, with an input voltage variation of 85 percent to 115 percent of rated input voltage. This is consistent with the current temperature range and voltage variation requirement for other products operating under Part 15. We solicit comment as to whether we should adopt a more specific requirement, such as a frequency tolerance specified in parts-per-million.

42. In discussions with NTIA, concern has been expressed about the susceptibility of non-government operations to interference from government operations. We note that under Part 15, unlicensed devices must accept any interference received.[38] We also note that, although we have specific legal authority to set mandatory standards regarding the ability of home electronic equipment to be unaffected by interference received from other devices, we have never implemented such requirements.[39] Finally, we recognize that industry often develops voluntary standards to address potential susceptibility problems.[40] Nevertheless, we appreciate the general concerns of government interests and invite comments as to whether we should rely on voluntary standards to address potential susceptibility problems associated with millimeter wave devices, or whether it may be advisable to establish mandatory standards governing the susceptibility of unlicensed equipment operating in the millimeter wave bands.[41]

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[38] See 47 CFR Section 15.5.

[39] See 47 U.S.C. Section 302(a).

[40] The Electronic Industries Association has developed RF susceptibility standards for TV receivers. See, for example, ANSI/EIA 544-1989, "Immunity of TV and VCR Tuners to Internally Generated Harmonic Interference from Signals in the Band 535 kHz to 30 MHz." The International Electrotechnical Commission and the Special International Committee on Radio Interference (CISPR) have also developed, and are developing, a number of susceptibility standards that can be applied to a variety of electrical and electronic products. See, for example, IEC Publication 801-3 (1984), "Electromagnetic Compatibility for industrial-process measurement and control equipment; Part 3: Radiated electromagnetic field requirements".

[41] Typically, we have refrained from adopting standards regarding the level of interference that home electronic equipment must be able to withstand because we have felt such requirements could pose an excessive and unneeded regulatory burden. Instead, we have generally relied on the manufacturers and users of Part 15 devices to correct any problems

If mandatory standards are deemed necessary, we request comment on appropriate susceptibility requirements to adopt. If mandatory standards are deemed not necessary, we invite comments as to the information that unlicensed device manufacturers may require about government operations to enable design of equipment that will be less susceptible to interference from such systems.

43. Part 15 transmitters are subject to the equipment authorization procedure of certification, as specified in Section 2.1031, et seq., of our rules.[42] The certification procedure requires that tests be performed to measure the levels of RF energy that are radiated by the device into the open air or conducted by the device onto the electrical power lines. After these tests have been performed, a report must be produced showing the test procedure, the test results, and some additional information about the device, including design drawings. We propose to subject unlicensed millimeter wave transmitters to the certification requirements.

44. The current Part 15 rules do not include a specific measurement procedure for devices operating above 40 GHz. However, several general requirements which are pertinent for devices operating above 40 GHz are contained in Sections 15.31 of the rules , as well as the requirements in Sections 15.33 and 15.35 on the frequency range over which tests must be performed and the measurement instrument detector function and bandwidth. We expect that, at least initially, we may certify equipment under the general guidance provided in these sections and in accordance with good engineering practice. However, comments are invited on whether more specific guidance is needed for measurements performed on devices operating above 40 GHz and, if so, what measurement procedures are appropriate.[43]

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they encounter or for industry to develop voluntary standards for susceptibility. However, we recognize a lack of such standards can cause interference problems that may be difficult to resolve. Furthermore, we recognize that many other countries, including Canada and countries in Europe, adopt mandatory receiver and antennas standards as part of their overall interference protection plan.

[42] 47 CFR Section 2.1031, et seq.

[43] For unlicensed Part 15 transmitters operating on frequencies below 40 GHz, we apply the measurement procedures contained in "American National Standard for Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz", ANSI C63.4-1992, which was jointly developed by industry and FCC staff. This document is available as specified in 47 CFR Section 15.31(a)(6). We invite comment on the desirability of applying this standard, in whole or in part, to unlicensed or possibly licensed millimeter wave equipment.

45. The current Part 15 rules do not require spurious emission measurements above 40 GHz.[44] If we do not raise this upper limit for the radiated emission measurements of all Part 15 devices, there will be an increased potential for harmful interference to new operations above 40 GHz. Consequently, we propose to require that all Part 15 transmitters operating above 30 GHz be measured to the fifth harmonic of the fundamental frequency or to 200 GHz, whichever is lower. We also propose that all Part 15 transmitters operating between 10 GHz and 30 GHz be measured to the fifth harmonic of the highest fundamental frequency or to 100 GHz, whichever is lower. Comments are requested on the costs of such tests and their effectiveness at reducing the potential for interference. Comments are also requested on the impact these proposed new testing requirements would have on existing lines of Part 15 equipment.

46. The measurement detector function used to test emissions from radio equipment has a significant impact on the amount of radiation that can be emitted by a device. An average detector function measures the average field intensity emitted by a device, and a peak detector measures the peak field intensity emitted by a device. The difference between an average detector reading and a peak detector reading is relatively small for a constant, amplitude-modulated signal, and quite large for a pulse-modulated signal. The current Part 15 rules specify use of instrumentation employing an average detector function for measurements above 1000 MHz.[45] We solicit comment as to whether such instrumentation is appropriate and generally available in the proposed millimeter wave bands. Also, as a matter of policy we have generally required that measurements of emissions above 1000 MHz be made with a minimum 1 MHz resolution bandwidth.[46] We are proposing to codify this requirement for all Part 15 devices.

47. Vehicular Radar Systems. We are generally proposing to apply the same technical and administrative requirements to vehicular radar systems as would be applied to unlicensed devices, with the exception of the power requirement. We propose to limit the peak power density of millimeter wave vehicular radar systems operated under Part 15 to 30 microwatts/square centimeter measured 3 meters from the radiating source and in the

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[44] See 47 CFR Section 15.33 for unlicensed Part 15 transmitters. See, also, 47 CFR Section 2.997 for licensed transmitters. The latter section does not place a limit on the upper frequency range over which emissions shall be measured. However, it states that emissions shall be measured "to the highest frequency practicable in the present state of the art of measurement techniques." The Commission has normally interpreted this upper limit to be 40 GHz. This results in no measurements of harmonics for any transmitter with a highest fundamental frequency above 20 GHz.

[45] The resolution bandwidth of the measuring instrument to be used above 1 GHz is not specified in the regulations, although ANSI C63.4-1992 does discuss the appropriate minimum resolution bandwidth for measurements above 1000 MHz. See 47 CFR Section 15.35(b).

[46] See note following Section 13.1.4.2 in ANSI C63.4-1992.

center of the main lobe of the radiation pattern. In addition, we propose a peak power density limit outside the main lobe of 200 nanowatts/square centimeter. We note that industry has been performing RF emissions tests on experimental vehicular radar equipment designed to operate in the millimeter wave bands.[47] These tests have indicated that our proposed power limits would allow development of effective radar equipment and, at the same time, minimize the potential for harmful interference. We believe that these limits, which are higher than those proposed for other unlicensed millimeter wave transmitters, are appropriate for automotive radar systems because their narrow beam widths and concentrated use on the nation's roadways will make them less of an interference threat.

## CONCLUSION

48. Millimeter wave technology is expected to break new ground in opening up vast, largely untapped regions of the radio spectrum. The proposals we are making are based on limited information and preliminary analyses. Accordingly, we fully expect that adjustments in these proposals may be necessary. Nevertheless, the potential benefits compel us to move forward based on the best available knowledge so that we can create opportunities that will bring new products and services to American businesses and consumers. We invite comment on the proposed frequency bands, and the spectrum requirements for unlicensed services, licensed services, and vehicular radar systems. We also solicit the broadest possible information on the appropriate regulatory and technical requirements for such services.

## PROCEDURAL MATTERS

49. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

50. Initial Regulatory Flexibility Analysis. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IFRA) of the expected impact on small entities of the proposals suggested in this document. The IFRA is set forth in Appendix A. Written public comments are requested on the IFRA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with

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[47] See letter dated March 21, 1994, from General Motors Research Corporation (RM-8308).

paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

51. Comment dates. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before January 30, 1995 and reply comments on or before March 1, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

52. The proposed action is authorized under Sections 4(i), 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended 47 U.S.C. Sections 154(i), 302, 303(e), 303(f), and 303(r).

53. For further information regarding this Notice of Proposed Rule Making, please send an electronic mail message via the internet to mmwaves@fcc.gov, or contact either Dr. Michael J. Marcus, Office of Engineering and Technology, (202) 653-8110 or Richard Engelman, Office of Engineering and Technology, at (202) 653-6289.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

### Initial Regulatory Flexibility Analysis

I. Reason for Action: The proposals in this Notice of Proposed Rule Making are put forth on our own initiative with the intention of allocating several frequency bands above 40 GHz for general consumer and commercial applications. This action is also taken, in part, to respond to the petition submitted by General Motors Research Corporation to amend Part 15 of our rules to permit the operation of a vehicular radar systems in the band 76-77 GHz.

II. Objectives: The objective of this proposal is to encourage commercial development of equipment that can operate in the frequency bands above 40 GHz. Such development would improve access to the National Information Infrastructure by making commercial use of technology developed for the U.S. Military.

III. Legal Basis: The proposed action is authorized under Sections 4(i), 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended 47 U.S.C. Sections 154(i), 302, 303(e), 303(f), and 303(r).

IV. Reporting, Record Keeping and Other Compliance Requirements: Licensed transmitters are subject to the authorization procedure of type acceptance. Unlicensed transmitters are subject to the authorization procedure of certification. Operators of licensed transmitters must also file license applications. Applicants for equipment authorization of products operating above 30 GHz will now be required to test for radiated emissions to the fifth harmonic of the highest fundamental frequency generated or 200 GHz, whichever is higher. They are now required to test only up to 40 GHz. Applicants for equipment authorization of products operating above 10 GHz and at or below 30 GHz will now be required to test for radiated emissions to the fifth harmonic of the highest fundamental frequency generated or 100 GHz, whichever is higher. They are now required to test only up to 40 GHz.

V. Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

VI. Description, Potential Impact and Number of Small Entities Involved: It is unknown how many small entities may be affected. Fewer than ten small entities will now be required to test radiated emissions from transmitters operating above 30 GHz to the fifth harmonic of the highest fundamental frequency generated or 200 GHz, whichever is higher. They are now required to test only up to 40 GHz. Fewer than ten small entities will now be required to test radiated emissions from transmitters operating above 10 GHz and at or below 30 GHz to the fifth harmonic of the highest fundamental frequency generated or 100 GHz, whichever is higher. They are now required to test only up to 40 GHz.

VII. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with Stated Objectives: None.

## APPENDIX B

I. Part 2 of Title 47 of the Code of Federal Regulations is revised to read as follows:

1. The authority citation for Part 2 continues to read as follows:

**AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.**

2. Section 2.106 is amended by revising column 4 for the frequency band 76-81 GHz and column 6 for the frequency bands 40.5-42.5 GHz, 47.2-50.2 GHz, 59-64 GHz, 71-74 GHz, 76-81 GHz, 84-86 GHz, 92-95 GHz, 95-100 GHz, 102-105 GHz, 116-126 GHz, 126-134 GHz, 134-142 GHz, and 151-164 GHz to read as follows:

**Section 2.106 Table of frequency allocations.**

* * * * *

| United States table | | FCC use designators | |
|---|---|---|---|
| Government | Non-government | Rule part(s) | Special-use frequencies |
| Allocation GHz (4) | Allocation GHz (5) | (6) | (7) |
| * * * * * | | | |
| 40.5-42.5<br><br><br><br>US211 | 40.5-42.5<br>BROADCASTING-SATELLITE.<br>/BROADCASTING/.<br>Fixed.<br>Mobile.<br>US211 | DOMESTIC PUBLIC FIXED (21). | |
| * * * * * | | | |
| 47.2-50.2<br>FIXED.<br>FIXED-SATELLITE (Earth-to-space).<br>MOBILE.<br>904 US264 US297 | 47.2-50.2<br>FIXED.<br>FIXED-SATELLITE (Earth-to-space).<br>MOBILE.<br>904 US264 US297 | RADIO FREQUENCY DEVICES (15).<br>DOMESTIC PUBLIC FIXED(21). | |
| * * * * * | | | |

| | | | |
|---|---|---|---|
| 59-64<br>FIXED.<br>INTER-SATELLITE.<br>MOBILE. 909<br>RADIOLOCATION 910<br>911 | 59-64<br>FIXED.<br>INTER-SATELLITE.<br>MOBILE. 909<br>RADIOLOCATION 910<br>911 | RADIO<br>FREQUENCY<br>DEVICES (15). | |

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|---|---|---|---|
| 71-74<br>FIXED.<br>FIXED-SATELLITE<br>(Earth-to-space).<br>MOBILE.<br>MOBILE-SATELLITE<br>(Earth-to-space).<br>US270 | 71-74<br>FIXED.<br>FIXED-SATELLITE<br>(Earth-to-space).<br>MOBILE.<br>MOBILE-SATELLITE<br>(Earth-to-space).<br>US270 | DOMESTIC PUBLIC<br>FIXED (21).<br>RADIO<br>FREQUENCY<br>DEVICES (15). | |

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|---|---|---|---|
| 76-81<br>RADIOLOCATION.<br>Space Research<br>(space-to-Earth)<br>912 | 76-81<br>RADIOLOCATION.<br>Amateur.<br>Amateur-Satellite.<br>912 | RADIO<br>FREQUENCY<br>DEVICES (15).<br>Amateur (97). | |

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| | | | |
|---|---|---|---|
| 84-86<br>FIXED.<br>MOBILE.<br><br><br>913 US211 | 84-86<br>FIXED.<br>MOBILE.<br>BROADCASTING.<br>BROADCASTING-<br>SATELLITE.<br>913 US211 | DOMESTIC PUBLIC<br>FIXED (21).<br>RADIO<br>FREQUENCY<br>DEVICES (15). | |

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|---|---|---|---|
| 92-95<br>FIXED.<br>FIXED-SATELLITE<br>(Earth-to-space).<br>MOBILE.<br>RADIOLOCATION.<br>914 | 92-95<br>FIXED.<br>FIXED-SATELLITE<br>(Earth-to-space).<br>MOBILE<br>RADIOLOCATION.<br>914 | RADIO<br>FREQUENCY<br>DEVICES (15). | |

| | | | |
|---|---|---|---|
| 95-100<br>MOBILE 902.<br>MOBILE-SATELLITE.<br>RADIONAVIGATION.<br>RADIONAVIGATION-SATELLITE.<br>Radiolocation.<br>903 904 | 95-100<br>MOBILE 902.<br>MOBILE-SATELLITE.<br>RADIONAVIGATION.<br>RADIONAVIGATION-SATELLITE.<br>Radiolocation.<br>903 904 | RADIO FREQUENCY DEVICES (15). | |

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| | | | |
|---|---|---|---|
| 102-105<br>FIXED.<br>FIXED-SATELLITE (space-to-Earth).<br>722 US211 | 102-105<br>FIXED.<br>FIXED-SATELLITE (space-to-Earth).<br>722 US211 | DOMESTIC PUBLIC FIXED (21).<br>RADIO FREQUENCY DEVICES (15). | |

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| | | | |
|---|---|---|---|
| 116-126<br>EARTH EXPLORATION-SATELLITE (passive).<br>FIXED.<br>INTER-SATELLITE.<br>MOBILE. 909<br>SPACE RESEARCH (passive).<br>722 915 916 US211 US263 | 116-126<br>EARTH EXPLORATION-SATELLITE (passive).<br>FIXED.<br>INTER-SATELLITE.<br>MOBILE. 909<br>SPACE RESEARCH (passive).<br>722 915 916 US211 US263 | DOMESTIC PUBLIC FIXED (21).<br>RADIO FREQUENCY DEVICES (15). | 122.5 GHz ± 500 MHz: Industrial, scientific and medical frequency. |
| 126-134<br>FIXED.<br>INTER-SATELLITE.<br>MOBILE. 909<br>RADIOLOCATION. 910 | 126-134<br>FIXED.<br>INTER-SATELLITE.<br>MOBILE. 909<br>RADIOLOCATION. 910 | DOMESTIC PUBLIC FIXED (21).<br>RADIO FREQUENCY DEVICES (15). | |
| 134-142<br>MOBILE 902<br>MOBILE-SATELLITE.<br>RADIONAVIGATION.<br>RADIONAVIGATION-SATELLITE.<br>Radiolocation.<br>903 917 918 | 134-142<br>MOBILE 902<br>MOBILE-SATELLITE.<br>RADIONAVIGATION.<br>RADIONAVIGATION-SATELLITE.<br>Radiolocation.<br>903 917 918 | RADIO FREQUENCY DEVICES (15). | |

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|---|---|---|---|
| 151-164<br>FIXED.<br>FIXED-SATELLITE.<br><br><br>211 | 151-164<br>FIXED.<br>FIXED-SATELLITE.<br><br><br>211 | DOMESTIC PUBLIC<br>FIXED (21).<br>RADIO<br>FREQUENCY<br>DEVICES (15). | |

* * * * *

3. Section 2.997 is amended to read as follows:

**Section 2.997 Frequency spectrum to be investigated.**

(a) In all of the measurements set forth in Sections 2.991 and 2.993 of this Part, the spectrum shall be investigated from the lowest radio frequency signal generated in the equipment, without going below 9 kHz, up to at least the frequency shown below:

(1) If the equipment operates below 10 GHz: to the tenth harmonic of the highest fundamental frequency or to 40 GHz, whichever is lower.

(2) If the equipment operates at or above 10 GHz and below 30 GHz: to the fifth harmonic of the highest fundamental frequency or to 100 GHz, whichever is lower.

(3) If the equipment operates at or above 30 GHz: to the fifth harmonic of the highest fundamental frequency or to 200 GHz, whichever is lower.

(b) Particular attention should be paid to harmonics and subharmonics of the carrier frequency as well as to those frequencies removed from the carrier by multiples of the oscillator frequency. Radiation at the frequencies of multiplier stages should also be checked.

(c) The amplitude of spurious emissions which are attenuated more than 20 dB below the permissible value need not be reported.

(d) Unless otherwise specified, measurements above 40.5 GHz shall be performed using a minimum resolution bandwidth of 1 MHz.

II. Part 15 of Title 47 of the Code of Federal Regulations is revised to read as follows:

1. The authority citation for Part 15 continues to read as follows:

**AUTHORITY: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.**

2. Section 15.33 is amended by revising paragraph (a) to read as follows:

**Section 15.33 Frequency range of radiated measurements.**

(a) For an intentional radiator, the spectrum shall be investigated from the lowest radio frequency signal generated in the device, without going below 9 kHz, up to at least the frequency shown below:

(1) If the intentional radiator operates below 10 GHz: to the tenth harmonic of the highest fundamental frequency or to 40 GHz, whichever is lower.

(2) If the intentional radiator operates at or above 10 GHz and below 30 GHz: to the fifth harmonic of the highest fundamental frequency or to 100 GHz, whichever is lower.

(3) If the intentional radiator operates at or above 30 GHz: to the fifth harmonic of the highest fundamental frequency or to 200 GHz, whichever is lower.

(4) If the intentional radiator contains a digital device, regardless of whether this digital device controls the functions of the intentional radiator or the digital device is used for additional control or function purposes other than to enable the operation of the intentional radiator, the frequency range shall be investigated up to the range specified in paragraphs (a)(1)-(a)(3) of this section or the range applicable to the digital device, as shown in paragraph (b)(1) of this Section, whichever is the higher frequency range of investigation.

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3. Section 15.35 is amended by revising paragraph (b) to read as follows:

**Section 15.35 Measurement detector functions and bandwidth.**

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(b) On any frequency or frequencies above 1000 MHz, unless otherwise stated, the radiated limits shown are based on the use of measurement instrumentation employing an average detector function. When average radiated emission measurements are specified in the regulations, including emission measurements below 1000 MHz, there is also a limit on the radio frequency emissions, as measured using instrumentation with a peak detector function, corresponding to 20 dB above the maximum permitted average limit for the frequency being investigated. Unless otherwise specified, measurements above 1000 MHz shall be performed using a minimum resolution bandwidth of 1 MHz. Measurements of AC power line conducted emissions are performed using a CISPR quasi-peak detector, even for devices for which average radiated emission measurements are specified.

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4. Section 15.205 is amended by adding a new paragraph (d)(4) to read as follows:

**Section 15.205 Restricted bands of operation.**

* * * * *

(d) * * *

(4) Any equipment operated under the provisions of Section 15.253.

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5. A new Section 15.253 is added to read as follows:

**Section 15.253 Operation within the bands 47.2-47.4 GHz, 59.0-64.0 GHz, 71.5-72.0 GHz, 76.0-77.0 GHz, 84.5-85.0 GHz, 94.7-95.7 GHz, 103.5-104.0 GHz, 116.5-117.0 GHz, 122.5-123.0 GHz, 126.5-127.0 GHz, 139.0-140.0 GHz and 152.5-153.0 GHz.**

(a) Operation under the provisions of this section is not permitted on aircraft.

(b) Operation within the bands 47.2-47.4 GHz, 76.0-77.0 GHz, 94.7-95.7 GHz and 139.0-140.0 GHz is restricted to devices whose primary mode of operation is as a vehicular-mounted field disturbance sensor. The transmission of additional information, such as data, is permitted provided the primary mode of operation is as a vehicular-mounted field disturbance sensor.

(c) The radiated emission limits above 47.2 GHz are as follows:

(1) The power density of any emission within the bands specified in this section shall not exceed 200 nanowatts/square centimeter at 3 meters, except that the power density of any transmitter used as a field disturbance sensor pursuant to paragraph (b) shall not exceed 30 microwatts/square centimeter at 3 meters when the vehicle is moving at a minimum rate of one kilometer/hour.

(2) The power density of any emissions outside the bands specified in this section shall not exceed 2 picowatts/square centimeter at 3 meters.

(3) Fundamental emissions must be contained within the frequency bands specified in this section during all conditions of operation. Equipment is presumed to operate over the temperature range -20 to +50 degrees celsius with an input voltage variation of 85% to 115% of rated input voltage, unless justification is presented to demonstrate otherwise.

(4) The limits in this paragraph are based on instrumentation employing an average detector.

(d) Radiated emissions below 47.2 GHz shall not exceed the general limits in Section 15.209 of this Part. The provisions in Section 15.35 of this Part for averaging pulsed emissions and for limiting peak emissions apply. Further, the provisions in Section 15.205 of this Part that limit spurious emissions appearing in the restricted bands below 40 GHz also apply.